# Ke Ala Pono — The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions

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## I. INTRODUCTION

In the fall of 2008, hundreds of Native Hawaiians[1] and their supporters lined the streets near the Hawai'i State Capitol wearing red T-shirts with the words "Kū I Ka Pono"[2] printed across the front and holding signs reading, "Justice for Hawaiians" and "Ceded Lands Are Stolen Lands."[3] The demonstrators were showing their support for a unanimous opinion authored by Chief Justice Ronald T.Y. Moon that placed a moratorium on the sale of state "ceded" lands—a groundbreaking decision that provides insight into the Moon Court's view of Native Hawaiian claims to lands, resources, and sovereignty.

This article examines the decisions of the Hawai'i Supreme Court during the seventeen-year tenure of Chief Justice Moon and the court's role as mediator and interpreter in addressing the claims of the Native Hawaiian community. It suggests that, to a large extent, Hawai'i's people are engaged in a reconciliation process rooted in kānaka maoli or Native Hawaiian values—values that seek balance, harmony, and aloha. The Moon Court has furthered these efforts in two significant ways: by opening the courts to Native Hawaiian claims and by

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[1] In this article, unless otherwise noted, "Native Hawaiian" means "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, §2, 107 Stat. 1510, 1513 (1993) [hereinafter Apology Resolution].

[2] Kū I Ka Pono means "Stand for Justice."

[3] *See* Lisa Asato, *Youth Uprising—Ceded Lands Case Spurs New Generation of Hawaiian Leaders*, KA WAI OLA, Jan. 2009, at 15, *available at* http://www.oha.org/kwo/2009/01/story01.php; *Groups Oppose Ceded-Land Appeal*, HONOLULU ADVERTISER, Nov. 24, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Nov/24/br/hawaii81124053.html.

understanding and recognizing the true harm—the emotional and spiritual costs as well as the loss of land and sovereignty—to the Native Hawaiian community.

This article surveys the Moon Court's decisions in three areas impacting Native Hawaiian rights. Necessarily, this can only be a brief summary of the most important cases because the Moon Court decided numerous cases dealing with Native Hawaiian issues.[4] First, the Moon Court built upon and expanded earlier decisions relating to Hawaiian traditional and customary rights. Second, the court proved largely sympathetic to Hawaiian Home Lands beneficiary claims relating to breaches of the Hawaiian Homes Commission Act. Finally, the court fully acknowledged the historical basis for Native Hawaiian claims when deciding controversial issues surrounding the public land trust or "ceded" lands. Jurisdictional and procedural obstacles have often threatened to sound the death knell for otherwise meritorious claims in all of these areas. Based on the significant public interest in addressing Native Hawaiian claims, the constitutional recognition of Native Hawaiian rights, and the court's own commitment to fairness, the Moon Court allowed Native Hawaiians to pursue their claims through the courts.

It would be a mistake to conclude that the Moon Court always ruled in favor of Native Hawaiian interests. Indeed, the court has rebuffed attempts to clarify the public land trust revenues due to the Native Hawaiian community.[5] In a criminal law context, the court also limited Native Hawaiian traditional and customary rights.[6] Nevertheless, it is a fair assessment to say that for the last seventeen years, under the leadership of Chief Justice Moon, the Hawai'i Supreme Court has chosen the path of justice, Ke Ala Pono.

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[4] In addition to the thirteen cases discussed in this article, the Moon Court also decided important water rights and environmental cases that significantly impact the Native Hawaiian community. This is in sharp contrast to the court under Chief Justice Herman T. F. Lum, which issued relatively few opinions on Native Hawaiian issues and has been criticized for the widespread use of non-precedential memorandum opinions. *See* Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992) [hereinafter MacKenzie, *The Lum Court*]. As discussed *infra* Part III, the Lum Court did decide a leading case, *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), in which Associate Justice Robert G. Klein, writing for a unanimous court, established important principles on standing and sovereign immunity as well as substantive law on Native Hawaiian traditional and customary rights and the State's trust duties relative to the public land trust.

[5] See *infra* Part V for a discussion of *Office of Hawaiian Affairs v. State* (*OHA I*), 96 Haw. 388, 31 P.3d 901 (2001), *Office of Hawaiian Affairs v. State* (*OHA II*), 110 Haw. 338, 133 P.3d 767 (2006), and *Office of Hawaiian Affairs v. Hawaii State Legislature*, No. 30535, 2010 Haw. LEXIS 184 (Aug. 18, 2010).

[6] See *infra* Part III for a discussion of *State v. Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998).

## II. THE HISTORICAL CONTEXT[7]

*Hānau ka 'āina, hānau ke ali'i, hānau ke kanaka.*
*Born was the land, born were the chiefs, born were the common people.*[8]

So begins an ancient Hawaiian proverb that describes the inseparable spiritual and genealogical connection between Native Hawaiians and the land and environment. For Native Hawaiians, the land, or 'āina, is not a mere physical reality. Instead, it is an integral component of social, cultural, and spiritual life.[9] Like many indigenous peoples, Native Hawaiians see an interdependent, reciprocal relationship between the gods, the land, and the people.

In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but as communal and shared.[10] The land, like a cherished relative, cared for the Native Hawaiian people, and in return, the people cared for the land.[11] The principle of mālama 'āina (care of the land) is therefore directly linked to conserving and protecting not only the land and its resources, but humankind and the spiritual world as well.[12]

Western colonialism throughout the eighteenth and nineteenth centuries dramatically altered this relationship to the land. Hawaiian lands were divided, confiscated, and sold away.[13] Native Hawaiian cultural practices were barred and ways of life denigrated.[14] Large sugar plantations diverted water from

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[7] Text in this section has appeared in other publications, including Melody Kapilialoha MacKenzie, *Law and the Courts*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE 85 (Craig Howes & Jonathan Kay Kamakawiwo'ole Osorio eds., 2010); Melody Kapilialoha MacKenzie, Susan K. Serrano & Koa Laura Kaulukukui, *A New Kind of Environmental Justice: Indigenous Hawaiians Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV'T 37, 37 (2007); and NATIVE HAWAIIAN LAW (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., Native Hawaiian Rights Handbook 2d ed., forthcoming 2013).

[8] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 56 (1983).

[9] DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 23-26 (2007).

[10] LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 24 (1992); E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 41 (1972).

[11] KAME'ELEIHIWA, *supra* note 10, at 24.

[12] *Id.*

[13] NATIVE HAWAIIAN RIGHTS HANDBOOK 6-10 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK]; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 366-68 (Nell Jessup Newton et al. eds., 2005).

[14] *See, e.g.*, I NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 191-98 (1983) (Hawaiian language); Noenoe K. Silva, *He*

Hawaiian communities.[15] Hawaiians were separated from the land, thereby severing cultural and spiritual connections.

In the Māhele, the Hawaiian Kingdom's mid-nineteenth century conversion to private property, King Kamehameha III set aside more than 1.5 million acres as Government Lands for the benefit of the chiefs and people.[16] The Crown Lands, which had originally been reserved as the King's private lands and made inalienable in 1865, comprised almost a million acres and provided a source of income and support for the Crown.[17] Following the illegal overthrow of the Hawaiian government in 1893 by U.S. military-backed American businessmen[18] and the 1894 establishment of the Republic of Hawai'i, the Government and Crown Lands were merged.[19] In 1898, the Republic "ceded" approximately 1.8 million acres of these lands to the United States through a Joint Resolution of Annexation.[20]

In 1921, the U.S. Congress passed the Hawaiian Homes Commission Act (HHCA)[21] to address the deteriorating social and economic conditions of the Hawaiian people.[22] Congress set aside approximately 203,000 acres of the Government and Crown Lands, designated as Hawaiian Home Lands, for a homesteading program benefitting those of not less than fifty percent Hawaiian ancestry.[23]

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*Kānāwai E Ho'opau I Na Hula Kuolu Hawai'i: The Political Economy of Banning the Hula*, 34 HAWAIIAN J. HIST. 29 (2000) (hula). *See also* Doe v. Kamehameha Schs., 295 F. Supp. 2d 1141, 1150 (D. Haw. 2003) (internal citations omitted) (describing effect of Western influences on Native Hawaiians).

[15] HANDBOOK, *supra* note 13, at 153; D. Kapua'ala Sproat, *Water*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 7, at 187, 188-90.

[16] See generally KAME'ELEIHIWA, *supra* note 10, for a detailed explanation of the Māhele. The Māhele process "transformed the traditional Land tenure system from one of communal tenure to private ownership on the capitalist model." *Id.* at 8. *See also* MCGREGOR, *supra* note 9, at 35-40.

[17] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 40-42, 89-92, 111-17 (2008).

[18] Apology Resolution, *supra* note 1, "whereas" cls. 5-10, § 1(1), (3), 107 Stat. at 1510-11, 1513.

[19] A provision of the Land Act of 1895 (codified at LAWS OF HAWAII 1895, § 445) defined public lands to include Government and Crown lands. Land Act of 1895, 1895 Haw. Sess. Laws 49-83.

[20] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).

[21] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691-718 (1958)) (omitted from codification in 1959) (set out in full as amended at 1 HAW. REV. STAT. 261).

[22] *See infra* Part IV.

[23] Hawaiian Homes Commission Act, 1920, § 208. See generally HANDBOOK, *supra* note 13, at ch. 3 for a discussion of the history and implementation of the HHCA. *See infra* Part IV.

The 1959 Hawai'i Admission Act transferred approximately 1.4 million acres of the Government and Crown Lands, including the HHCA lands, to the State.[24] As a condition of statehood and as a trust responsibility, Hawai'i agreed to incorporate the HHCA into the state constitution and administer the Hawaiian Home Lands.[25] The State was to hold all of the transferred lands, along with their income and proceeds, for one or more of five trust purposes, including benefitting Native Hawaiians, as defined in the HHCA.[26]

In 1978, after more than a decade of activism focused on struggles over land, efforts to halt the U.S. Navy's bombing of the island of Kaho'olawe, and cultural revitalization,[27] the people of Hawai'i amended their constitution to "prescribe[] an idealized, self-sufficient, and environmentally sensitive approach to government."[28] Among the amendments were provisions recognizing the right to a clean and healthful environment[29] and declaring Hawai'i's natural resources to be held in trust by the State for the benefit of the people.[30] Probably the most far-reaching amendments, however, addressed long-standing claims of the Hawaiian community. These amendments were

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[24] Admission Act of 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6.

[25] Section 4 of the Admission Act provides, in part: "As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State[.]" *Id.* § 4; *see also* Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982). The *Ahuna* court described the genesis of the Hawaiian Homes Commission Act and concluded that the federal government undertook "a trust obligation benefiting the aboriginal people," and that "the State of Hawaii assumed this fiduciary obligation upon being admitted into the Union as a state." *Id.* at 338, 640 P.2d at 1168.

[26] Section 5(f) of the Admission Act provides:

> The lands granted to the State of Hawaii . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admission Act, § 5(f) (emphasis added).

[27] *See* Jonathan Kay Kamakawiwo'ole Osorio, *Hawaiian Issues*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 7, at 15, 15-21 (discussing the Hawaiian movement and its evolution).

[28] Tom Coffman, *Reinventing Hawai'i*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 7, at 9, 12.

[29] HAW. CONST. art. XI, § 9.

[30] *Id.* art. XI, § 1.

reparatory—they sought to redress historical claims and to provide resources and a measure of self-determination to Native Hawaiians. They recognized the loss of sovereignty and land resulting from the 1893 illegal overthrow of the Hawaiian Kingdom, and they specifically dealt with three of the areas of law in which the Moon Court has made its most groundbreaking decisions—the traditional and customary rights of Native Hawaiians, the Hawaiian Home Lands trust, and the "ceded" or public land trust.

The 1978 constitutional amendments recognized and protected the traditional and customary practices of ahupua'a tenants.[31] Other amendments sought to strengthen the Hawaiian Home Lands program by ensuring sufficient funding and reaffirming the State's commitment to faithfully carry out the terms of the HHCA.[32] The amendments established an Office of Hawaiian Affairs (OHA), with a board of trustees elected by the Hawaiian people to manage resources and funds, including revenue from the public land trust.[33] Another amendment clarified that the lands designated as part of the public land trust, about 1.2 million acres after separating out the HHCA lands, were held in trust for Native Hawaiians and the general public.[34]

Other amendments mandated that the State promote the study of Hawaiian culture, history, and language and provide for a Hawaiian education program in the public schools.[35] The Hawaiian language was designated as one of two official languages of Hawai'i,[36] and limitations were placed on the doctrine of adverse possession, which played a significant role in the dispossession of Hawaiians from their lands.[37]

In the decades since the enactment of these provisions, Hawai'i courts have been called upon to interpret these amendments, to explicate the terms of the Hawaiian Home Lands and public land trusts, and to give both the trusts and amendments concrete meaning. The Moon Court has not backed away from that responsibility. It has sought reconciliation and healing and, most

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[31] *Id.* art. XII, § 7. An ahupua'a is an economically self-sufficient, pie-shaped unit that runs from the mountaintops down ridges spreading out at the base along the shore. *In re* Boundaries of Pulehunui, 4 Haw. 239, 241-42 (1879). *See also infra* Part III.

[32] HAW. CONST. art. XII, §§ 1-3. *See* Nelson v. Hawaiian Homes Comm'n, 127 Haw. 185, 277 P.3d 279 (2012) (what constitutes "sufficient sums" for Department of Hawaiian Home Lands' administrative and operating expenses is not a political question, but what constitutes "sufficient sums" in relation to development of homestead lots, loans, and rehabilitation projects present nonjusticiable political questions).

[33] *Id.* art. XII, §§ 5-6.

[34] *Id.* art. XII, § 4.

[35] *Id.* art. X, § 4.

[36] *Id.* art. XV, § 4.

[37] *Id.* art. XVI, § 12. See LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 115-19 (1989) and HANDBOOK, *supra* note 13, at 119-22, for discussion of adverse possession in Hawai'i.

importantly, allowed the claims of the Hawaiian people to be fully expressed and heard. In almost all cases, the Moon Court has consciously chosen Ke Ala Pono, the path of justice.

## III. TRADITIONAL AND CUSTOMARY RIGHTS

Hawaiian customary practices have been recognized under Hawai'i law since the earliest days of the Hawaiian Kingdom.[38] The conversion in the Māhele process from a communal land tenure system to a fee simple system in the mid-1800s included a procedure by which Native Hawaiian tenants could claim title to their house lots, plus any lands they had under cultivation. These lots are called kuleana—meaning "right, title, portion"[39]—and the law allowing native tenant claims is known as the Kuleana Act.[40] Section 7 of the Kuleana Act, now codified as Hawai'i Revised Statutes section 7-1, provides that "the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use."[41] The deliberations of the 1850 Privy Council show that

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[38] The Hawai'i Supreme Court noted in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)* that the Kingdom of Hawai'i courts were specifically authorized to cite and adopt "[t]he reasonings and analysis of the common law, and of the civil law [of other countries] . . . so far as they are deemed to be founded in justice, and *not in conflict with the laws and usages of this kingdom.*" 79 Haw. 425, 437 n.21, 903 P.2d 1246, 1258 n.21 (1995) (citing Act to Organize the Judiciary (Sept. 7, 1847), ch. I, § 4 (emphasis added)). Shortly thereafter, the Kingdom's legislature passed a resolution calling for the preparation of a civil code, which provided that: "The Judges . . . are *bound* to proceed and decide according to equity . . . . To decide equitably, *an appeal is to be made . . . to received usage*, and resort may also be had to the laws and usages of other countries . . . [not in] conflict with the laws and *customs* of this kingdom." *Id.* (quoting CIVIL CODE OF THE HAWAIIAN ISLANDS ch. III, §§ 14, 823 (1859) (emphases added)). These provisions remained in effect until repealed in 1892 and replaced with the predecessor of Hawai'i Revised Statutes section 1-1. *Id.* (citing An Act to Reorganize the Judiciary Department (Nov. 25, 1892), ch. LVII, § 5).

[39] *See* MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 179 (rev. ed. 1986).

[40] Act of August 6, 1850, STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 202-04 (1850).

[41] Section 7-1 states in full:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (2009).

section 7 of the Kuleana Act was added at the insistence of the king, who was concerned that "a little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value."[42]

A second basis for traditional and customary rights is found in the Hawaiian usage exception in Hawai'i Revised Statutes section 1-1, which declares the "common law of England, as ascertained by English and American decisions," as the common law of Hawai'i, "except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage.*"[43] Hawai'i courts have held that since this section is derived from an act approved on November 25, 1892, "Hawaiian usage" means usage that predates November 25, 1892.[44]

In 1978, Hawai'i voters adopted and added Article XII, section 7, to the state constitution, reaffirming traditional and customary Hawaiian practices:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[45]

The committee reports and debates on the amendment indicate that it was intended to be broadly construed and to cover a wide range of customary rights and was not intended to "remove or eliminate any statutorily recognized rights or any rights of native Hawaiians" but to "encompass all rights of native Hawaiians such as access and gathering."[46]

In a series of cases, the Hawai'i Supreme Court has interpreted these three laws in relation to Native Hawaiian access and gathering practices.[47] In the

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[42] 3B Privy Council Record 681, 713 (1850). The Privy Council thus adopted the King's suggestion: "[T]he proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to[.]" *Id.*

[43] HAW. REV. STAT. § 1-1 (2009) (emphasis added).

[44] State *ex rel.* Kobayashi v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970).

[45] HAW. CONST. art. XII, § 7.

[46] Delegates to the 1978 Hawai'i Constitutional Convention proposing this amendment declared: "The proposed new section reaffirms *all* rights customarily and traditionally held by ancient Hawaiians. . . . [B]esides fishing rights, other rights for sustenance, cultural and religious purposes exist. Hunting, gathering, access and water rights . . . [were] an integral part of the ancient Hawaiian civilization and are retained by its descendants." HAWAIIAN AFFAIRS COMM., STANDING COMM. REP. NO. 57, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637, 640 (1980) (emphasis added).

[47] *See, e.g.*, McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam); Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968).

1982 case *Kalipi v. Hawaiian Trust Co.*, Chief Justice William S. Richardson, writing for a unanimous court, held that gathering rights derive from both Hawai'i Revised Statutes sections 7-1 and 1-1.[48] The court stated that pursuant to article XII, section 7 of the constitution, Hawai'i courts are obligated "to preserve and enforce such traditional rights."[49]

The *Kalipi* court also laid out some limitations; in order to assert a right to gather the items enumerated in section 7-1, an ahupua'a tenant must satisfy three conditions: (1) physically reside within the ahupua'a; (2) gather on undeveloped lands within the ahupua'a; and (3) gather for the purpose of practicing Native Hawaiian customs.[50] The court also recognized that section 1-1 ensures that other Native Hawaiian customs and practices not specifically enumerated in section 7-1 may continue, "so long as no actual harm is done thereby."[51] It adopted a balancing test in which "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."[52] Ten years later, in *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court under Chief Justice Herman T.F. Lum[53] held that Native Hawaiian rights protected by article XII, section 7 may "extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[54] The court clarified that although customary rights under section 7-1 are limited to the ahupua'a in which a native tenant lives, section 1-1's "'Hawaiian usage' clause may establish certain customary Hawaiian rights beyond those found in section 7-1."[55]

The Hawai'i Supreme Court has repeatedly emphasized that Native Hawaiians have standing to pursue their claims where their cultural practices are adversely affected. This is exemplified in the first, and some would say the most groundbreaking, of the Moon Court's traditional and customary rights decisions, *Public Access Shoreline Hawaii v. Hawai'i County Planning*

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[48] 66 Haw. 1, 11-13, 656 P.2d 745, 751-52 (1982).

[49] *Id.* at 4, 656 P.2d at 748.

[50] *Id.* at 7-9, 656 P.2d at 749-50.

[51] *Id.* at 10, 656 P.2d at 751.

[52] *Id.*

[53] The *Pele Defense Fund v. Paty* opinion was written by Associate Justice Robert G. Klein. See generally Kahikino Noa Dettweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005), for a discussion of several of the most important Native Hawaiian rights cases decided by Chief Justice William S. Richardson and Associate Justice Robert G. Klein.

[54] 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[55] *Id.* at 618, 837 P.2d at 1270 (citing *Kalipi*, 66 Haw. at 9-10, 656 P.2d at 750).

*Commission* (*PASH*),[56] an opinion authored by Associate Justice Robert G. Klein. In *PASH*, developer Nansay Hawaii had applied for a Special Management Area (SMA) permit for a resort development on Hawai'i island, and the shoreline organization Public Access Shoreline Hawaii (PASH) requested a contested case hearing before the Hawai'i County Planning Commission (HPC) to oppose the development.[57] The HPC denied PASH's request and approved the permit.[58] PASH filed suit, alleging that the HPC violated Hawai'i Revised Statutes chapter 91, the Hawaii Administrative Procedure Act.[59] The trial court agreed with PASH, vacated the SMA permit, and ordered the HPC to hold a contested case hearing and to include PASH as a participant.[60] The Intermediate Court of Appeals affirmed with respect to PASH.[61]

On appeal, the Hawai'i Supreme Court first examined whether the circuit court had jurisdiction to consider PASH's appeal. This turned on whether all the requirements of Hawai'i Revised Statutes section 91-14, which allows appeals from a contested case hearing, had been met.[62] The court first found that the proceeding at issue was a contested case hearing because it determined the "rights, duties, and privileges of specific parties" and was "required by law."[63] The court then concluded that the HPC's action was "a final decision and order" such that deferral of review would deprive PASH of adequate relief.[64] A final requirement was that the claimant had followed the applicable agency rules and participated in the contested case hearing.[65] Here, the court found that PASH testified against the grant of the SMA permit at the HPC's public hearing and, pursuant to the HCP's rules, had requested and been denied a formal contested case hearing.[66] The court stated that "[t]he mere fact that PASH was not formally granted leave to intervene in a contested case is not dispositive because it did everything possible to perfect its right to appeal."[67]

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[56] Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 429, 903 P.2d 1246, 1250 (1995).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 430, 903 P.2d at 1251.

[60] *Id.*

[61] *Id.* The Intermediate Court of Appeals, however, found that the appeal by another party, Angel Pilago, was appropriately dismissed by the circuit court, explaining that Pilago's acknowledged interest in the proceeding was not a sufficiently "personal" interest "clearly distinguishable from that of the general public." *Id.* (citations omitted).

[62] *Id.* at 431, 903 P.2d at 1252.

[63] *Id.* at 431-32, 903 P.2d at 1252-53.

[64] *Id.* at 433, 903 P.2d at 1254.

[65] *Id.*

[66] *Id.* at 434, 903 P.2d at 1255.

[67] *Id.*

In addition to the above requirements, the claimant's legal interests must have been injured; PASH needed to meet standing requirements.[68] The HPC denied PASH's contested case hearing request because it found that PASH's asserted interests were "substantially similar" to those of the general public.[69] The court began its discussion of standing by chastising the HPC for its "restrictive interpretation of standing requirements."[70] In a footnote, the court stated that:

> The cultural insensitivity demonstrated by Nansay and the HPC in this case—particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public—emphasizes the need to avoid "foreclos[ing] challenges to administrative determinations through restrictive applications of standing requirements."[71]

The court found that PASH had sufficiently demonstrated, through unrefuted testimony, that its members, as Native Hawaiians who exercised traditional and customary rights on undeveloped lands within the relevant ahupua'a, had interests in the SMA permit that were clearly distinguishable from those of the general public.[72]

After disposing of the jurisdictional questions, the court turned to the substantive issues. Ultimately, the court determined that Native Hawaiians retain rights to pursue traditional and customary activities because land patents in Hawai'i confirm only a limited property interest when compared with land patents in other jurisdictions.[73]

Nansay Hawaii did not directly contest that traditional Hawaiian gathering rights, including gathering food and fishing for 'ōpae, or shrimp, were exercised on its land,[74] but Nansay argued that "[w]hen the owner develops land, the gathering rights disappear."[75] The court rejected this argument, holding instead that the HPC was "obligated to protect the reasonable exercise

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[68] *Id.* at 431, 903 P.2d at 1252.

[69] *Id.* at 434, 903 P.2d at 1255.

[70] *Id.*

[71] *Id.* at 434 n.15, 903 P.2d at 1255 n.15 (citations and internal quotation marks omitted; brackets in original).

[72] *Id.* at 434, 903 P.2d at 1255.

[73] *Id.* at 447, 903 P.2d at 1268.

[74] *Id.* at 430 n.6, 903 P.2d at 1251 n.6 (noting that "[a]t the hearing before the [HPC], Nansay did not directly dispute the assertion that unnamed members of PASH possess traditional native Hawaiian gathering rights at Kohanaiki, including food gathering and fishing for '[ō]pae, or shrimp, which are harvested from the anchialline ponds located on Nansay's proposed development site").

[75] Second Supplemental Brief (Opening Brief) for Petitioner-Appellee-Appellant Nansay Hawaii at 19, Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 903 P.2d 1246 (1995) (No. 15460).

of traditional and customary rights to the extent feasible under the Hawai'i Constitution and relevant statutes."[76] The court traced the origins of Hawai'i Revised Statutes section 1-1 to an 1847 act of Kamehameha III,[77] allowing the judiciary to adopt common law principles, provided they did not "conflict with the laws and usages of this kingdom."[78] The *PASH* court further stressed, "the precise nature and scope of the rights retained by § 1-1 . . . depend upon the particular circumstances of each case."[79]

The court examined the extent to which section 1-1 preserved customary practices, noting that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under that statute.[80] The court also distinguished the doctrine of custom in Hawai'i from English common law in several ways. First, contrary to the "time immemorial" standard, traditional and customary practices in Hawai'i must be established in practice by November 25, 1892.[81] Second, continuous exercise of the right is not required, though the custom may become more difficult to prove without it.[82] The *PASH* court stated that "the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site."[83]

The court set out a test for the doctrine of custom, requiring that a custom be consistent when measured against other customs,[84] a practice be certain in an objective sense,[85] and a traditional use be exercised in a reasonable manner.[86] Defining the reasonable use requirement, the court further explained that the balance leans in favor of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."[87]

While recognizing that in real property matters "the western concept of exclusivity is not universally applicable in Hawai'i[,]" the court addressed

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[76] *PASH*, 79 Haw. at 437, 903 P.2d at 1258 (stating that "the HPC is obligated to protect traditional and customary rights to the extent feasible under the Hawai'i Constitution and relevant statutes").

[77] *Id.* at 437 n.21, 903 P.2d at 1258 n.21.

[78] *Id.*

[79] *Id.* at 438, 440, 903 P.2d at 1259, 1261 (quoting Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992)).

[80] *Id.* at 439, 903 P.2d at 1260.

[81] *Id.* at 447 n.39, 903 P.2d at 1268 n.39.

[82] *Id.* at 441 n.26, 903 P.2d at 1262 n.26 (citation omitted).

[83] *Id.* at 450, 903 P.2d at 1271.

[84] *Id.* at 447, 903 P.2d at 1268 (internal quotation marks omitted).

[85] The court stated, "[A] particular custom is certain if it is objectively defined and applied; certainty is not subjectively determined." *Id.* at 447 n.39, 903 P.2d at 1269 n.39 (internal quotation marks omitted).

[86] *Id.* at 447, 903 P.2d at 1268 (citation and internal quotation marks omitted).

[87] *Id.* at 447 n.39, 903 P.2d at 1268 n.39 (citation and internal quotation marks omitted).

concerns that the ruling could lead to disruption, stating that "the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances."[88] The court also held that the State has the authority to "reconcile competing interests";[89] thus, "[d]epending on the circumstances of each case, once land has reached the point of 'full development' it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property."[90] The *PASH* court cautioned, however, that "[a]lthough access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 [of the Hawai'i Constitution] does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the[se] rights . . . out of existence."[91]

The *PASH* court also clarified that descendents of Native Hawaiians who inhabited the islands prior to 1778 "who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum."[92] The *PASH* court declined to decide, however, whether descendants of non-Hawaiian citizens of the Hawaiian Kingdom are entitled to such protection and expressly reserved comment on whether non-Hawaiian members of an 'ohana or extended family may legitimately claim traditional and customary rights protected by state law.[93]

In 1998, in a criminal case, the Hawai'i Supreme Court sought to clarify and perhaps alleviate some of the concerns raised by the *PASH* decision.[94] In *State v. Hanapi*, the court held that "it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected."[95]

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[88] *Id.* at 447, 903 P.2d at 1268.

[89] *Id.*

[90] *Id.* at 451, 903 P.2d at 1272 (emphasis added).

[91] *Id.* (emphasis in original); *see also id.* at 441 n.26, 903 P.2d at 1262 n.26 (stating that one of the requirements for custom is that the use or right at issue is "obligatory or compulsory (when established)"). The guidance provided in *PASH* was never applied on remand in that case; the landowner withdrew its permit application and the proceedings were terminated. Kevin Dayton, *Resort Plan Contrasts with Initial Outcry*, HONOLULU ADVERTISER, Oct. 3, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Oct/03/ln/ln04a.html.

[92] *PASH*, 79 Haw. at 449, 903 P.2d at 1270.

[93] *Id.* at 449 n.41, 903 P.2d at 1270 n.41.

[94] The *PASH* decision brought strong negative responses from private property interests and state lawmakers. Dayton, *supra* note 91. *See generally* D. Kapua Sproat, Comment, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998); David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 HAW. B.J. 1 (1998). *See also* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (MIS) Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 354 (2003) (characterizing the *Hanapi* case as a "retreat from the broader language in *PASH*, but . . . a relatively minor one").

[95] 89 Haw. 177, 184, 970 P.2d 485, 492 (1998).

The defendant, Alapa'i Hanapī, lived in the ahupua'a of 'Aha'ino, Moloka'i, on property adjacent to two fishponds.[96] The owner of the adjoining land had graded and filled the area near the ponds, violating federal wetlands regulations.[97] After complaints by Hanapī, the U.S. Army Corps of Engineers allowed the landowner to conduct a voluntary, unsupervised restoration of the property, subject to the oversight of a consultant/archaeologist.[98] Hanapī believed that the landowner's actions desecrated a "traditional ancestral cultural site"[99] and that it was his right and obligation as a Native Hawaiian to perform religious and traditional ceremonies in order to heal the land.[100] Hanapī twice entered the property without incident to observe and monitor the restoration.[101] On a third visit, Hanapī was ordered off the property; Hanapī refused and was charged with second-degree criminal trespass.[102]

At trial, the district court rejected Hanapī's defense of privilege based upon his constitutional rights as a Native Hawaiian.[103] The Hawai'i Supreme Court affirmed Hanapī's conviction.[104] The court recognized that "constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes."[105] The court then set out three minimum requirements to successfully assert a defense based on a constitutionally protected Native Hawaiian right.[106]

First, a defendant must qualify as a Native Hawaiian as defined in *PASH*—a descendant of Hawaiians who inhabited the islands prior to 1778, regardless of blood quantum.[107] Second, a defendant must "establish that his or her claimed right is constitutionally protected as a customary or traditional" Native Hawaiian practice.[108] To establish the existence of a traditional or customary

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[96] *Id.* at 178, 970 P.2d at 486. The fishponds were named Kihaloko and Waihilahila. *Id.*

[97] *See id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 181, 970 P.2d at 489.

[101] *Id.* at 178, 970 P.2d at 486.

[102] *Id.* at 178-79, 970 P.2d at 486-87.

[103] *Id.* at 179-81, 970 P.2d at 487-89.

[104] *Id.* at 185, 188, 970 P.2d at 493, 496.

[105] *Id.* at 184, 940 P.2d at 492.

[106] *Id.* at 185-86, 970 P.2d at 493-94. A recent Hawai'i Supreme Court decision sets out the analysis courts should apply once a defendant has met *Hanapi*'s three minimum requirements. State v. Pratt, 127 Haw. 206, 277 P.3d 300 (2012).

[107] *Hanapi*, 89 Haw. at 186, 970 P.2d at 494.

[108] *Id.* The court noted that, although some customary and traditional Native Hawaiian rights are codified in article XII, section 7 of the Hawai'i Constitution, or in Hawai'i Revised Statutes sections 1-1 and 7-1, "[t]he fact that the claimed right is not specifically enumerated in the Constitution or statutes[] does not preclude further inquiry concerning other traditional and customary practices that have existed." *Id.* (citing Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 438, 903 P.2d 1246, 1259 (1995)) (emphasis

practice, there must be an "adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice."[109] This foundation can be laid through testimony of experts or kama'āina witnesses[110] as proof of ancient Hawaiian tradition, custom, and usage.[111] Finally, a defendant must prove that "the exercise of the right occurred on undeveloped or less than fully developed property."[112] The court clarified *PASH* by holding that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property."[113] The court, however, reserved the question of the status of traditional and customary rights on less than fully developed property.[114]

Two years later, in the 2000 case, *Ka Pa'akai O Ka 'Aina v. Land Use Commission* (*Ka Pa'akai*), the Hawai'i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests."[115] This case arose from the State Land Use Commission's (LUC) reclassification of nearly 1010 acres of land in the Ka'ūpūlehu ahupua'a on the island of Hawai'i from conservation to urban use upon application by Ka'upulehu Developments (KD).[116] KD sought to develop a luxury subdivision with upscale homes, a golf course, and other amenities.[117] The plaintiff, Ka Pa'akai O Ka 'Āina, an association of Native Hawaiian organizations, had participated in a contested case hearing on KD's application before the LUC.[118] Ka Pa'akai argued that the traditional and customary gathering rights of its members would be adversely affected by the development.[119] As in *PASH*, the court first examined the jurisdictional requirements, specifically standing, for bringing an appeal under chapter 91 of

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removed).

[109] *Id.* at 187, 970 P.2d at 495.

[110] A kama'āina witness is "a person familiar from childhood with any locality." *In re* Ashford, 50 Haw. 314, 315 n.2, 440 P.2d 76, 77 n.2 (1968) (quoting *In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879)). Kama'āina literally means "land child[,]" and refers to one who is "[n]ative-born, one born in a place[.]" PUKUI & ELBERT, *supra* note 39, at 124.

[111] *Hanapi*, 89 Haw. at 187, 970 P.2d at 495.

[112] *Id.* at 186, 970 P.2d at 494 (citing *PASH*, 79 Haw. at 450, 903 P.2d at 1271).

[113] *Id.* at 186-87, 970 P.2d at 494-95.

[114] *Id.* at 187, 970 P.2d at 495 (citing *PASH*, 79 Haw. at 450, 903 P.2d at 1271).

[115] 94 Haw. 31, 46-47, 7 P.3d 1068, 1083-84 (2000).

[116] *Id.* at 34, 7 P.3d at 1071.

[117] *Id.* at 36, 7 P.3d at 1073.

[118] *Id.*

[119] *Id.* at 34-36, 7 P.3d at 1071-73.

the Hawai'i Revised Statutes. In determining that Ka Pa'akai had standing, the Hawai'i Supreme Court recognized that,

> [w]ith regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." . . . Our "fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court."[120]

On the merits, the court held that the LUC improperly delegated its obligations under article XII, section 7, of the Hawai'i Constitution by placing a condition in the reclassification order requiring KD to preserve and protect Native Hawaiian gathering and access rights.[121] The court found this wholesale delegation of responsibility to the developer "was improper and misses the point. These issues must be addressed before the land is reclassified."[122]

The court also held that the LUC's findings and conclusions were insufficient to determine whether it fulfilled its obligation to preserve and protect traditional and customary rights of Native Hawaiians. The court concluded that, as a matter of law, the LUC "failed to satisfy its statutory and constitutional obligations."[123] The court held that the LUC should have, at a minimum, made specific findings and conclusions regarding:

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.[124]

The Moon Court also addressed Native Hawaiian traditional and customary rights in other contexts.[125] In August 2010, just a few weeks before his retirement, Chief Justice Moon authored the majority opinion in the Hawai'i Supreme Court's first case involving iwi kūpuna,[126] or Native Hawaiian

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[120] *Id.* at 42, 7 P.3d at 1079 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 614-15, 837 P.2d 1247, 1268-69 (1992)).

[121] *Id.* at 50, 7 P.3d at 1087.

[122] *Id.*

[123] *Id.* at 48, 7 P.3d at 1085.

[124] *Id.* at 47, 7 P.3d at 1084 (internal footnotes omitted).

[125] Two water use cases, *In re Wai'ola o Moloka'i*, 103 Haw. 401, 83 P.3d 664 (2004), and *In re Kukui (Moloka'i), Inc.*, 116 Haw. 481, 174 P.3d 320 (2007), discussed extensively elsewhere in this issue, illustrate the court's adherence to the *Ka Pa'akai* guidelines.

[126] See generally HANDBOOK, *supra* note 13, at 245-73, for a discussion of Native Hawaiian beliefs and practices, as well as the laws, related to iwi kūpuna.

ancestral remains. In *Kaleikini v. Thielen*, the O'ahu Island Burial Council (OIBC), pursuant to the provisions of Hawai'i's burial law, Hawai'i Revised Statutes chapter 6E, approved a burial treatment plan by landowner General Growth Properties (GGP) allowing the disinterment and relocation of Native Hawaiian burials at GGP's proposed project, Ward Villages Shops.[127] Paulette Kaleikini, a recognized cultural descendant of the iwi kūpuna in question, attempted to challenge the decision of the OIBC and sought to have the iwi preserved in place since a critical tenet of Native Hawaiian traditional and customary practice requires "ensur[ing] that iwi remain undisturbed and . . . receive proper care and respect."[128]

Hawai'i Revised Statutes section 6E-43(c) allows such decisions to "be administratively appealed to a panel composed of three [burial] council chairpersons and three members from [the Board of Land and Natural Resources (BLNR)] as a contested case" pursuant to Hawai'i Revised Statutes chapter 91, the Hawaii Administrative Procedure Act.[129] Kaleikini submitted a written request for a "contested case hearing," claiming that as "a recognized cultural descendant . . . and a possible lineal descendant"[130] of the affected iwi kūpuna, she had the right to a hearing under chapter 6E, its implementing administrative regulations, and article XII, section 7 of the Hawai'i Constitution.[131]

The BLNR chair denied the request for a contested case,[132] and Kaleikini filed two separate actions in state circuit court. The circuit court dismissed the first action for declaratory and injunctive relief seeking to prevent the removal of the iwi; Kaleikini's appeal was stayed as a result of GGP's bankruptcy.[133] The second action was an appeal under chapter 91, seeking review of the denial of Kaleikini's request for a contested case hearing.[134] The circuit court also dismissed Kaleikini's chapter 91 appeal, stating that it lacked jurisdiction because Kaleikini had not participated in a contested case hearing, a prerequisite to judicial review.[135] The circuit court specifically noted the "Catch 22" conundrum because "if you're denied a contested case hearing, and the denial can't be appealed, then there is no way to get judicial review of that. And any agency could improperly deny a contested case hearing."[136]

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[127] 124 Haw. 1, 5-6, 237 P.3d 1067, 1071-72 (2010).
[128] *Id.* at 6, 237 P.3d at 1072.
[129] HAW. REV. STAT. § 6E-43(c) (2009).
[130] *Kaleikini*, 124 Haw. at 7, 237 P.3d at 1073.
[131] *Id.* at 9, 237 P.3d at 1075.
[132] *Id.* at 7, 237 P.3d at 1073.
[133] *Id.* at 10 n.15, 237 P.3d at 1076 n.15.
[134] *Id.* at 10, 237 P.3d at 1076.
[135] *Id.* at 8, 237 P.3d at 1074.
[136] *Id.*

Nevertheless, the circuit court dismissed the case based on a 2006 Hawai'i Supreme Court decision, *Aha Hui Mālama O Kaniakapupu v. Land Use Commission*,[137] which it interpreted as holding that actual participation in a contested case hearing was a prerequisite to appealing an agency decision.[138] The Hawai'i Intermediate Court of Appeals affirmed the dismissal, declaring the case moot.[139]

In the Hawai'i Supreme Court, Kaleikini argued that her case was *not* moot, and that the court should hear her appeal because it presented an issue of public importance and fell within the "'capable of repetition yet evading review' exception to the mootness doctrine."[140] On the merits, she contended that unlike the plaintiff in *Kaniakapupu*, she had requested a contested case hearing but her request had been unlawfully denied.[141] She argued that she was entitled to the contested case hearing because of the language of Hawai'i Revised Statutes section 6E-43(c), the administrative rules implementing chapter 6E, and article XII, section 7 of the Hawai'i State Constitution, all of which protected the traditional and customary rights of Native Hawaiian ahupua'a tenants.[142] The State countered that although section 6E-43(c) did allow a person aggrieved by the decision of a burial council to request a contested case hearing, the administrative rule clarified the statute and provided that a contested case hearing was necessary only if "required by law," and that the BLNR chair had broad discretion to grant or deny such a request.[143]

On August 12, 2010, the Hawai'i Supreme Court ruled in Kaleikini's favor.[144] First, the majority opinion declared that although the case was indeed moot—the iwi had already been removed—it was nevertheless appropriate for the court to decide the case on the merits under the public interest exception to the mootness doctrine.[145] A decision was necessary to answer a legal question of great public importance and to guide public officials in the future.[146] Pointing to the legislative history of Hawai'i's burial law, the court noted that the Legislature specifically stated that "[t]he public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all."[147] In addition, the court cited the

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[137] 111 Haw. 124, 139 P.3d 712 (2006).

[138] *Kaleikini*, 124 Haw. at 8, 237 P.3d at 1074.

[139] *Id.* at 11, 237 P.3d at 1077.

[140] *Id.* at 12, 237 P.3d at 1078.

[141] *Id.* at 11, 237 P.3d at 1077.

[142] *Id.* at 17, 237 P.3d at 1083.

[143] *Id.*

[144] *Id.* at 27, 237 P.3d at 1093. Justices Nakayama and Duffy joined the majority opinion, and Justices Acoba and Recktenwald concurred separately in the judgment.

[145] *Id.* at 13, 237 P.3d at 1079.

[146] *Id.* at 12-13, 237 P.3d at 1078-79.

[147] *Id.* at 13, 237 P.3d at 1079.

Legislature's finding that "[N]ative Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance."[148] These legislative pronouncements, the court said, "evince a recognition of the public importance of the issue presented here, *i.e.*, 'the process of deciding to remove previously identified Native Hawaiian burial sites.'"[149] Thus, the court concluded that the question presented was of public importance.[150]

The court also recognized that a Native Hawaiian whose "legal interests stem from her cultural and religious beliefs regarding the protection of the iwi"[151] had standing. The court noted:

> Throughout the instant litigation, Kaleikini has averred that her cultural and religious beliefs require her to ensure that the iwi [are] left undisturbed and that the OIBC's decision, allowing GGP to disinter the iwi, has caused her cultural and religious injury. As such, we believe Kaleikini has alleged sufficient facts upon which this court can determine she has standing.[152]

The majority then decided the merits in Kaleikini's favor. They agreed that while the BLNR chair did have a certain level of discretion in deciding whether to grant a petition for a contested case hearing, that discretion was limited to determining whether the petitioner had met the proper *procedural* prerequisites to obtain a hearing.[153] If so, as in the case of Kaleikini who had fulfilled all of the procedural prerequisites, the chair had no discretion to deny the request for a hearing. In reaching this result, the majority opinion relied upon the text of section 6E-43 and the administrative rules implementing that section.[154]

The Moon Court's decision in *Kaleikini* will have a significant impact on the treatment of iwi kūpuna under state law. First, the court not only

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[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 26, 237 P.3d at 1092.

[152] *Id.* at 20-21, 237 P.3d at 1086-87.

[153] *Id.* at 21, 237 P.3d at 1087. The court also discussed the holding in *Bush v. Hawaiian Homes Commission* (*Bush I*), 76 Haw. 128, 870 P.2d 1272 (1994), where Hawaiian Home Lands beneficiaries had requested a contested case hearing to challenge agreements between homestead lessees and third-parties for use of homestead land. The court distinguished *Bush I* because the specific language of the implementing rule at issue in *Bush I* did not require that a contested case hearing be held. *Id.* at 18-19, 237 P.3d at 1084-85.

[154] *Id.* at 17, 21, 237 P.3d at 1083, 1087. Justice Acoba concurred in the judgment but, inter alia, would have reached the same result based on the state constitutional provision protecting the traditional and customary rights of Native Hawaiian ahupua'a tenants. *Id.* at 30-31, 237 P.3d at 1096-97 (Acoba, J., concurring). Justice Recktenwald also concurred but believed that the circuit court had misinterpreted *Aha Hui Mālama O Kaniakapupu v. Land Use Commission*, 111 Haw. 124, 139 P.3d 712 (2006). *Id.* at 43, 237 P.3d at 1109 (Recktenwald, J., concurring).

acknowledged the public interest in ensuring the protection of Native Hawaiian traditional and customary rights,[155] but it also specifically recognized the constitutional basis in article XII, section 7 for the protection of iwi kūpuna.[156] Second, as a result of the court's decision, a cultural or lineal descendant concerned about the proposed treatment of iwi will be able to request a contested case hearing to challenge decisions to disinter and relocate iwi kūpuna.[157]

The *Kaleikini* decision, written by Chief Justice Moon himself, provides a fitting closure to his judicial legacy. It illustrates the Moon Court's general approach to Native Hawaiian traditional and customary rights. That approach has been characterized as giving full recognition to Native Hawaiian cultural rights that existed prior to the institution of a fee-simple property rights regime and insuring access to the courts so that those rights can be fully implemented. In *Ka Pa'akai*, the court established specific responsibilities for state agencies to ensure the protection of traditional and customary rights.[158] The court has repeatedly stated, beginning with *PASH* and then with *Ka Pa'akai* and *Kaleikini*, that Native Hawaiian rights are matters of great public importance in Hawai'i and that Native Hawaiians must be allowed to assert their unique interest in exercising cultural rights. Thus, in the area of traditional and customary rights, the direction that Chief Justice Richardson first pointed to in *Kalipi*[159] has been more fully explicated under the guidance of Chief Justice Moon. In broadly construing traditional and customary rights to include not only access and gathering, but also other cultural practices such as the protection of iwi kūpuna and the preservation of resources vital to practitioners, the Moon Court has chosen to continue on Ke Ala Pono, the path of justice.

## IV. THE HAWAIIAN HOMES COMMISSION ACT[160]

The Hawaiian Homes Commission Act (HHCA), passed by Congress in 1921, set aside a portion of the Hawaiian Kingdom's Government and Crown lands for Hawaiian homesteading.[161] The contours of the HHCA, however, were based on earlier actions of the Republic of Hawai'i and the United States. Prior to annexation, the Republic had opened up some Government and Crown

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[155] *Id.* at 13, 237 P.3d at 1079.

[156] *Id.* at 26, 237 P.3d at 1092.

[157] *Id.*

[158] Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 45, 7 P.3d 1068, 1082 (2000).

[159] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[160] Some of the text in this section has appeared in HANDBOOK, *supra* note 13, at ch. 1.

[161] HANDBOOK, *supra* note 13, at 43.

lands in a general homesteading program.[162] A 1910 congressional amendment to the Hawai'i Organic Act directed the Territory to open the Government and Crown lands for homesteading in a given area when twenty-five or more qualified homesteaders applied for land.[163] Since many sugar plantation leases on these lands were due to expire during the 1920s and 1930s, sugar growers were afraid that when the leases expired, choice sugar lands would be put into homesteading under the 1910 amendment. Hawai'i's large plantation owners feared that homesteading would destroy their thriving plantations.[164]

During the same period, Hawaiian leaders became alarmed by the rapidly deteriorating social and economic conditions of the Hawaiian people.[165] The high rate of crime and juvenile delinquency as well as increased homelessness within the Hawaiian community made it "evident that the remnant of Hawaiians required assistance to stem their precipitous decline."[166]

These forces converged in 1921 to promote passage of the Hawaiian Homes Commission Act. Congress set aside approximately 203,000 acres of Government and Crown lands to be leased to Native Hawaiians of not less than fifty percent aboriginal blood at a nominal fee for ninety-nine years.[167] The homesteading approach to rehabilitation

> was consistent with long-established American and Hawaiian traditions. It was further reinforced . . . by the suggestion that dispossessed Hawaiians would be returning to the soil, going back to the cultivation of at least a portion of their ancestral lands . . . .[168]

The sugar interests supported the HHCA because it carefully defined the lands that Native Hawaiians could receive,[169] which excluded forest reserves and cultivated sugar cane lands.[170] Most homestead lands were arid and of

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[162] Land Act of 1895, 1895 Haw. Laws 48-83; *see* ROBERT H. HOROWITZ ET AL., PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS, LEGISLATIVE REFERENCE BUREAU REPORT NO. 5, at 5-15 (1969) (detailed analysis of the Act); VAN DYKE, *supra* note 17, at 188-99 (discussing the 1895 Land Act).

[163] An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900).

[164] TOM DINNELL ET AL., THE HAWAIIAN HOMES PROGRAM: 1920-1963, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1, at 6 (1964).

[165] *See generally* Davianna Pōmaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1 (1990).

[166] DINNELL ET AL., *supra* note 164, at 2-3.

[167] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, §§ 203, 207, 208, 42 Stat. 108, 109-11 (1921).

[168] DINNELL ET AL., *supra* note 164, at 7.

[169] *See* McGregor, *supra* note 165, at 14-27.

[170] Hawaiian Homes Commission Act, 1920, § 203, 42 Stat. at 109-10 (1921). Also excluded were lands under a homestead lease, right of purchase lease, or certificate of occupation. *Id.*

marginal value; many were actually lava rock.[171] Moreover, while Hawaiian leaders had originally proposed a bill making all Native Hawaiians eligible for homesteading, the sugar growers, fearful that large numbers would demand lands, maneuvered to have the blood quantum set at fifty percent.[172]

In 1959, when Hawai'i became a state, only 1673 Native Hawaiians had received homesteads, with four house lots to every farm lot.[173] An additional 2200 Native Hawaiians were on the homestead waiting list.[174] Fifty years later, 9748 Native Hawaiians lease 45,566 acres of Hawaiian homestead land while 26,170 Native Hawaiians remain on the waiting list.[175]

Section 4 of the Hawai'i Admission Act required the State to adopt the Hawaiian Homes Commission Act as part of its constitution.[176] Section 4 also provides that the United States must approve any amendments to the Act altering the qualifications for or diminishing the benefits to beneficiaries.[177] Moreover, under the HHCA, Congress retains the power to alter, amend, or repeal any of its provisions.[178] Thus, although primary responsibility for administration of the program was transferred to the State as a condition of statehood, the federal government also retains significant responsibility for the HHCA.

In 1982, Chief Justice William S. Richardson in *Ahuna v. Department of Hawaiian Home Lands* established that the State should be held to the "high

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[171] *See* ALLEN A. SPITZ, LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1B, at 19-26 (1964).

[172] See KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (2008) for an in-depth analysis and discussion of the blood quantum restrictions of the HHCA. See generally M.M. Vause, The Hawaiian Homes Commission Act, History and Analysis (June 1962) (unpublished M.A. thesis, University of Hawai'i) for a discussion of factors leading to passage of the HHCA and blood quantum limitations.

[173] SPITZ, *supra* note 171, at 17.

[174] 1980-81 DEPT. OF HAWAIIAN HOME LANDS ANN. REP., 'ĀINA HO'OPULAPULA, at 8.

[175] 2009 DEPT. OF HAWAIIAN HOME LANDS ANN. REP. 29 (homestead awards); DEP'T OF HAWAIIAN HOME LANDS APPLICANT SUMMARY AS OF JUNE 30, 2011, at 5 (applicants), *available at* http://www.hawaiianhomelands.org/wp-content/uploads/2011/06/2011-06-30_01-Oahu_Waitlist_153pgs.pdf.

[176] Admission Act of 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4, provides, in part: "As a compact with the United States relating to the management and disposition of Hawaiian home lands, the Hawaiian Homes Commission Act, . . . shall be adopted as a provision of the Constitution of said State . . . ."

[177] Admission Act § 4 provides: "[A]ny amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States."

[178] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 223, 42 Stat. 108, 115 (1921) provides: "The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title."

fiduciary duties normally owed by a trustee to its beneficiaries."[179] The opinion added that the State should be judged by "the most exacting fiduciary standards."[180] These duties included the duty to act solely in the interests of the beneficiaries and to exercise reasonable care and skill in dealing with trust property.[181] Chief Justice Richardson's *Ahuna* opinion and the trust standards he established continue to impact not only Hawaiian Home Lands cases but also those related to the public land trust.[182]

During the tenure of Chief Justice Moon, beneficiaries of the Hawaiian Home Lands trust were able to continue turning to the courts to enforce the HHCA's provisions. The court also allowed beneficiaries who had been involved in a failed administrative process to address individual breach of trust claims to file their claims in state circuit court. Finally, the court more clearly defined the extent of the State's jurisdiction and control over HHCA trust lands.

In the 1995 case *Aged Hawaiians v. Hawaiian Homes Commission*, an unincorporated association of Native Hawaiian beneficiaries over the age of seventy who had been on the homestead pastoral waiting list for decades, some since 1952, sued the Hawaiian Homes Commission (HHC) and the Department of Hawaiian Home Lands (DHHL), the state administrative agency responsible for implementing the HHCA.[183] The Aged Hawaiians sought the opportunity to lease pastoral lands for commercial ranching.[184] Through a series of actions—including adopting a policy granting pastoral lots of no more than 100 acres for subsistence ranching,[185] denying the request for a contested case hearing by one of the original plaintiffs,[186] and adopting a ten-premise guideline for the allocation of pastoral land[187]—the HHC tried to implement a pastoral homestead plan to distribute small pastoral lots.[188] The Aged Hawaiians filed suit under 42 U.S.C. § 1983 and, inter alia, alleged that the HHC, under color of state law, had deprived them of due process rights under the Fourteenth Amendment to the U.S. Constitution by failing to provide them with a reasonable opportunity to obtain a pastoral homestead award large enough to support commercial ranching.[189] After considering this factually and

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[179] 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982).

[180] *Id.* at 339, 640 P.2d at 1169 (quoting Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)) (emphasis omitted).

[181] *Id.* at 340, 640 P.2d at 1169.

[182] *See infra* Part V.B.

[183] 78 Haw. 192, 197, 891 P.2d 279, 284 (1995).

[184] *Id.* at 195-97, 891 P.2d at 282-84.

[185] *Id.* at 195-96, 891 P.2d at 282-83.

[186] *Id.* at 196-97, 891 P.2d at 283-84.

[187] *Id.* at 196, 891 P.2d at 283.

[188] *Id.* at 197-98, 891 P.2d at 284-85.

[189] *Id.* at 201, 891 P.2d at 288 (citing to both the HHCA and Hawai'i Revised Statutes

procedurally complex case, the Hawai'i Supreme Court decided that the HHC had violated the Aged Hawaiians' due process rights.[190]

The court first held that beneficiaries of the federal-state compact "contained in the Hawaii Admission Act and [which] incorporates HHCA trust obligations" may bring claims under section 1983.[191] The court stated that the federal-state compact limits the way Hawai'i may manage Hawaiian Home Lands and that "Congress enacted . . . a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust."[192] The court then concluded that "the HHCA and the Admission Act impose a binding obligation on the State"[193] and that "the judiciary is authorized to enforce the relevant terms of the Admission Act and the HHCA in the instant case."[194]

After determining that the Aged Hawaiians could sue under 42 U.S.C. § 1983, the court turned to the merits of the due process claim. The court noted that a fundamental requirement for a successful due process claim is the deprivation of a property interest.[195] The court concluded that HHCA beneficiaries on the homestead waiting list are entitled to homestead awards; that a "property interest" includes benefits that one is entitled to receive by statute; and that the Aged Hawaiians' claims were based on valid property interests.[196]

The court then reviewed the specific procedures required to satisfy due process, balancing: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.[197] The court concluded that the balance of interests tilted in favor of the beneficiaries based on "the procedural infirmities that have already taken place"[198] and determined that beneficiaries on the pastoral waiting

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chapter 91).

[190] *Id.* at 195, 213, 891 P.2d at 282, 300.

[191] *Id.* at 213, 891 P.2d at 300.

[192] *Id.* at 206, 891 P.2d at 293 (quoting Price v. Akaka (*Akaka II*), 3 F.3d 1220, 1225 (9th Cir. 1993)) (internal quotation marks omitted).

[193] *Id.* at 208, 891 P.2d at 295.

[194] *Id.* at 208-09, 891 P.2d at 295-96.

[195] *Id.* at 211, 891 P.2d at 298 (citing Pele Def. Fund v. Puna Geothermal Venture, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994)).

[196] *Id.* at 211, 891 P.2d at 298.

[197] *Id.* at 212, 891 P.2d at 299 (citing Kernan v. Tanaka, 75 Haw. 1, 22-23, 856 P.2d 1207, 1219-20 (1993)).

[198] *Id.*

list were entitled to contested case hearings to consider their applications for pastoral lot awards of sufficient acreage for commercial ranching activities.[199]

The court concluded that the Aged Hawaiians were entitled, as a matter of law, to summary judgment on their due process claims because the HHC had failed to adequately consider the Aged Hawaiians' acknowledged desire for land sufficient to engage in commercial ranching.[200] Although beneficiaries on the pastoral wait list were "not entitled to 'economic units' *per se*," the court determined that they must be given the "opportunity to seek such an award prior to the implementation of a pastoral homestead lot award plan."[201]

In another complex case, *Bush v. Watson*, the Hawai'i Supreme Court ruled that the practice of allowing Hawaiian Home Lands lessees to lease their homestead lands to non-Hawaiians violated the HHCA.[202] From 1980 to 1992, non-Hawaiian farmers entered into third-party agreements (TPAs) with Native Hawaiian lessees on Moloka'i, where the non-Hawaiian third parties contracted to use the lessees' crop acres for farming or pastoral purposes in return for monthly payments ranging from $120 to $200.[203] Four Native Hawaiian beneficiaries filed suit pursuant to 42 U.S.C. § 1983, seeking a declaration that the TPAs approved by the HHC were contrary to the HHCA and therefore illegal.[204]

Before determining the legality of the TPAs, the court addressed three jurisdictional challenges: standing, claim preclusion/res judicata, and sovereign immunity.[205] Finding that "standing barriers should be lowered in cases of public interest under our jurisdiction," the court applied the three-part "injury-in-fact" test from *Pele Defense Fund v. Paty*.[206] The court held that appellants

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[199] *Id.* at 213, 891 P.2d at 300.

[200] *Id.*

[201] *Id.* (emphasis in original).

[202] Bush v. Watson (*Bush II*), 81 Haw. 474, 487, 918 P.2d 1130, 1143 (1996). In *Bush v. Hawaiian Homes Commission* (*Bush I*), 76 Haw. 128, 870 P.2d 1272 (1994), the Hawai'i Supreme Court held that it lacked jurisdiction to hear an appeal by homestead beneficiaries who challenged TPAs through the Hawaii Administrative Procedure Act, chapter 91 of the Hawai'i Revised Statutes, because the beneficiaries had not "participated" in a contested case hearing even though the beneficiaries had requested a contested case hearing. *Id.* at 134, 870 P.2d at 1278. In *Bush I*, the court reviewed whether there was a statutory, rule-based, or constitutionally-mandated requirement for a contested case hearing and determined that there was no such requirement. *Id.* at 134-36, 870 P.2d at 1278-80. The court left open the possibility of challenging the HHCA's approval of the TPAs through other means. *Id.* at 137, 870 P.2d at 1281; *see also* Kaleikini v. Thielen, 124 Haw. 1, 18-19, 237 P.3d 1067, 1084-85 (2010) (discussing the *Bush I* holding).

[203] *Bush II*, 81 Haw. at 477, 918 P.2d at 1133.

[204] *Id.* at 477-78, 918 P.2d at 1133-34.

[205] *See id.* at 479-82, 918 P.2d at 1135-38.

[206] *Id.* at 479, 918 P.2d at 1135 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 594, 837 P.2d 1247, 1258 (1992)). The test requires that (1) the plaintiff suffer an actual or threatened injury

adequately established grounds for standing because "the HHC's approval of the TPAs has injured trust beneficiaries by allowing non-Hawaiian third parties to acquire large parcels of homestead lots[,] . . . [thereby] unduly burden[ing] the Appellants' commercial farming interests."[207] Secondly, "these injuries [were] traceable to the HHC's approval of the TPAs," and finally, "invalidation of the TPAs would allow the Appellants to pursue commercially viable farming efforts."[208]

Next, the court examined whether the beneficiaries' claims were precluded by parallel federal litigation[209] raising identical challenges to the TPAs.[210] The court found that the federal litigation did not preclude the beneficiaries' claims[211] because the federal case did not address the allegation that the TPAs violated the HHCA, did not reach the merits of the dispute, and did not involve the same parties or their privities.[212] Consequently, appellants' claims were not barred by res judicata.[213]

In examining the State's sovereign immunity defense, the court again turned to *Pele Defense Fund v. Paty*,[214] stating that "[i]f the relief sought against a state official is *prospective* in nature, then the relief *may be allowed* regardless of the state's sovereign immunity . . . ."[215] Finding that there would be "no direct and unavoidable effect on the state treasury"[216] and that voiding the TPAs would not render the State liable to the contracting parties since each TPA contained an indemnity provision protecting DHHL from liability,[217] the court held that sovereign immunity did not bar the beneficiaries' claims.[218]

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resulting from the defendant's wrongful conduct; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision would likely provide relief for the injury. *Id.*

[207] *Id.* at 479, 918 P.2d at 1135.

[208] *Id.*

[209] Han v. U.S. Dep't of Justice, 45 F.3d 333 (9th Cir. 1995).

[210] *Bush II*, 81 Haw. at 478-79, 918 P.2d at 1134-35 (citing Han v. U.S. Dep't of Justice, 824 F. Supp. 1480 (D. Haw. 1993), *aff'd*, 45 F.3d 333 (9th Cir. 1995)).

[211] *Id.* at 480, 918 P.2d at 1136.

[212] *Id.* The court found the HHC's argument that *Han* should be preclusive because Appellants Bush and Kahae participated as amici in the appeal to the Ninth Circuit unpersuasive because they did not "control the course of the proceedings" nor were "any of the plaintiffs in *Han* representative of any of the Appellants in the instant case." *Id.* at 480-81, 918 P.2d at 1136-37.

[213] *See id.* at 481, 918 P.2d at 1137.

[214] 73 Haw. 578, 609-10, 837 P.2d 1247, 1266-67 (1992) (applying *Ex parte* Young, 209 U.S. 123 (1908)).

[215] *Bush II*, 81 Haw. at 481, 918 P.2d at 1137 (quoting *Pele Def. Fund*, 73 Haw. at 609-10, 837 P.2d at 1266) (emphasis added).

[216] *Id.*

[217] *Id.* at 482, 918 P.2d at 1138. In making this finding, the court expressly declined to adopt the federal courts' "narrow view" that a claim for relief based on past illegal action is necessarily "retrospective," as such an interpretation would pose an "onerous burden on

After addressing all of the jurisdictional issues, the court turned to the merits. The appellants alleged that the TPAs violated section 208(5)[219] of the HHCA, which prohibits lessees from transferring or holding their leasehold for the benefit of anyone except a Native Hawaiian beneficiary and prohibits lessees from subleasing their parcels.[220] The State argued that the TPAs were mere licenses, which did not create property interests.[221]

The court noted it was clear that "compared with ordinary leaseholders, Hawaiian homestead lessees do not possess all of the 'sticks in the bundle of rights commonly characterized as property.'"[222] Looking to cases decided by the territorial courts for guidance,[223] the court found the specific terms and nature of the agreement should be closely examined to determine "whether it

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potential claimants." *Id.* at 482 n.9, 918 P.2d at 1138 n.9. Instead, the court focused its inquiry on whether the relief sought for a past violation of law was "tantamount to an award of damages" or would merely have an "ancillary" effect on the state treasury. *Id.* at 481, 918 P.2d at 1137.

[218] *Id.* at 483, 918 P.2d at 1139.

[219] Under this provision, a lessee does not possess the right to "transfer to, or otherwise hold for the benefit of, any another person . . . except a native Hawaiian or Hawaiians, and then only upon the approval of the department . . . [or to] sublet the [lessee's] interest in the tract or improvements thereon." *Id.* at 484, 918 P.2d at 1140. Moreover, pursuant to Hawai'i Administrative Rules (H.A.R.) section 10-3-35, lessees are prohibited from "entering into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by the lessee's lease for the cultivation of crops or the raising of livestock without the approval of the HHC." *Id.*

[220] *Id.*

[221] *Id.* at 482-83, 918 P.2d at 1138-39.

[222] *Id.* at 484, 918 P.2d at 1140 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)). The court found that although some of the relevant agreements were discussed in *Bush v. Hawaiian Homes Commission* (*Bush I*), 76 Haw. 128, 136, 870 P.2d 1272, 1280 (1994), that court *only* determined that due process does not require a hearing in a request for approval of a TPA because such proceedings do not involve the potential deprivation of any "property interest" held by the lessee under the HHCA and H.A.R. *Bush II*, 81 Haw. at 484, 918 P.2d at 1140. The court did not, however, effect a "definitive interpretation" of TPAs, nor were its findings in *Bush I* equivalent to a finding that TPAs approved by the HHC do not convey property interests. *Id.*

[223] *Bush II*, 81 Haw. at 485, 918 P.2d at 1141. The court looked to a similar case, *Territory v. Tsunekichi*, 23 Haw. 813 (1917), in which a lessee was charged with unlawfully removing sugar cane from his homestead by allowing a milling company to enter and, for a fee, remove sugar cane, subject to a mortgage between the lessee and the sugar company. *Bush II*, 81 Haw. at 485, 918 P.2d at 1141. That court considered the agreement to be an "executory contract," but it did not reflect intent to transfer title, and thus did not constitute an illegal mortgage of the lessee's interest. *Id.* The court also noted *In re Henderson*, 21 Haw. 104 (1912), in which the territorial supreme court reversed a circuit court's order directing issuance of a land patent to the lessee because he had illegally assigned a portion of his interest in the land to a sugar company by entering into an agreement. *Id.* at 485-86, 918 P.2d at 1141-42.

complies with statutory restrictions."[224] In examining the nature of the TPAs, the court noted that it would not be limited by the name the parties have given the agreement and that authority exists for construing a "mere license" as an "interest in land."[225] The court ultimately found that the TPAs transferred "at least a portion of the lessees' extant interests in their homesteads," and provided a "right of entry (allowing non-Hawaiian third parties to cultivate crops and raise livestock on homestead lands)"[226] that was repugnant to the HHCA.[227]

The Hawai'i Supreme Court's 2006 ruling in *Kalima v. State*[228] is another example of the Moon Court's rejection of jurisdictional barriers in order to ensure access to the courts and, ultimately, a measure of justice for Native Hawaiians. In 1999, three individual plaintiffs[229] in the *Kalima* case brought a class action lawsuit against the State and state officials on behalf of 2721 claimants and beneficiaries of the Hawaiian Home Lands trust,[230] alleging breaches of trust from August 21, 1959, when Hawai'i was admitted as a state, to June 30, 1988.[231] The plaintiffs argued that the State's mismanagement of the trust resulted in actual damages to individual beneficiaries; their claims included: "(1) mismanagement of the extensive waiting list; (2) mishandling of the plaintiffs' applications; (3) preference policies regarding eligibility requirements; and (4) the awarding of raw lands lacking infrastructure."[232]

As part of the State's attempt to "address criticisms of the Hawaiian [H]ome [L]ands program and provide redress to its beneficiaries,"[233] the 1988 Hawai'i State Legislature passed Act 395,[234] providing a limited waiver of sovereign immunity for trust beneficiaries to pursue claims for trust breaches arising after July 1, 1988.[235] Although the Act also gave beneficiaries the right to sue retroactively,[236] due to the potential impact on the state treasury, the Governor

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[224] *Bush II*, 81 Haw. at 486, 918 P.2d at 1142.

[225] *Id.*

[226] *Id.* at 487, 918 P.2d at 1143.

[227] *Id.*

[228] 111 Haw. 84, 137 P.3d 990 (2006).

[229] The individual plaintiffs were Leona Kalima, Dianne Boner, and Joseph Ching. Ching passed away during the course of litigation and was represented in the appeal by Raynette Nalani Ah Chong, special administrator of Ching's estate. *Id.* at 94, 137 P.3d at 1000.

[230] *Id.* at 86, 137 P.3d at 992.

[231] *Id.*

[232] *Id.*

[233] *Id.* at 88, 137 P.3d at 994.

[234] Act of June 17, 1988, No. 395, 1988 Haw. Sess. Laws 942 (codified as amended at HAW. REV. STAT. ch. 673 (1993 & Supp. 2010)).

[235] *Kalima*, 111 Haw. at 88, 137 P.3d at 994.

[236] *Id.*

was allowed to propose a resolution of such claims.[237] As a result, the 1991 Legislature passed Act 323, codified as Hawai'i Revised Statutes chapter 674, which established a panel to receive and review the claims of individual trust beneficiaries arising between statehood and June 30, 1988,[238] and set forth deadlines for beneficiaries' claims.[239]

In 1997, in its first major substantive report on claims to the Governor and the Legislature,[240] the panel stated that 2752 claimants had filed a total of 4327 claims.[241] The panel categorized about sixty-seven percent of the total claims as "waiting list claims"—claims alleging an unreasonably long wait for a homestead award.[242] The panel had made final decisions on 172 claims, finding 165 of those claims meritorious and recommending approximately $6.7 million in damages.[243] The panel also requested a two-year extension to review the rest of the claims.[244]

The State Administration and Legislature, however, questioned the panel's damages formula and wanted to review all of the claims together before awarding any damages.[245] Thus, the Legislature did not act on the claims, but passed Act 382 establishing a "Working Group"[246] to "determine a formula and

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[237] *Id.*

[238] *Id.* at 90, 137 P.3d at 996. The panel was required to:

> [R]eceive, review, and evaluate the merits of an individual beneficiary's claim, and to submit a summary of the findings and an advisory opinion regarding the merits of each claim filed with the Panel, including an estimate of the probable award of actual damages or recommended corrective action to the 1993 and 1994 Legislatures.

*Id.* at 89, 137 P.3d at 995 (citing H. CONF. COMM. REP. NO. 64, *in* 1991 H. JOURNAL, at 801 (Haw. 1991)).

[239] *Id.* at 89, 137 P.3d at 995. Claimants were required to: (1) submit all claims to the panel by August 31, 1993; (2) file a written notice with the panel that the claimant does not accept legislative action on his or her claim by October 1, 1994; and (3) file an action in circuit court by September 30, 1996. *Id.* at 90, 137 P.3d at 996. Due to delays in naming panel members, the 1993 Legislature added two years to the initial claims filing deadline and extended other deadlines by three years. *Id.* Hence, the new deadline for filing claims with the panel was August 31, 1995. *Id.* The new deadline for filing written notices with the panel rejecting legislative action was set at October 1, 1997. *Id.* The new deadline for a claimant to file a suit in circuit court was set at September 30, 1999. *Id.* The Legislature also gave the panel more time to submit its final report, extending the deadline from 1994 to 1997. *Id.*

[240] *Id.* at 91, 137 P.3d at 997.

[241] *Id.* Of these claims, 3931 were accepted for investigation, 396 were closed, and "601 claims were concluded and in various stages of disposition." *Id.*

[242] *Id.* The panel categorized forty-two percent of claims as only "waiting list claims." *Id.* An additional twenty-five percent were claims that were "waiting list claims with other issues," including blood quantum determinations. *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.* at 92, 137 P.3d at 998. Members of the Working Group included the State Attorney

any criteria necessary to qualify and resolve claims" filed under chapter 674.[247] Act 382 gave the panel two more years to review claims[248] and also specified that its passage did not trigger a claimant's right to sue.[249] After months of meetings, a majority of the Working Group proposed a formula eliminating sixty percent of the claims, most of which were waiting list claims.[250] In response, several claimants filed suit, and a state circuit court struck down portions of Act 382 as violating the claimants' due process rights.[251]

After the circuit court's decision, the only portions of Act 382 that remained in effect extended the panel's life and required a final report to the 1999 Legislature, set an October 1, 1999 deadline for claimants to reject legislative action on their claims, and extended the deadline to file an action in court to December 31, 1999.[252]

The panel reported to the 1999 Legislature that it had completed forty-seven percent of all claims[253] and recommended cumulative damages totaling almost $16.5 million.[254] At the panel's request, the 1999 Legislature agreed to extend the panel's life by another year, but then-Governor Ben Cayetano vetoed the legislation.[255]

The panel's final report to the Legislature in late 1999 indicated that it had reviewed fifty-three percent of all claims[256] and recommended damages of a little over $1.5 million for sixty-nine newly reported claims.[257] The panel had also switched its focus from reviewing claims to notifying claimants of the October 1, 1999 notice-filing deadline.[258] By the deadline, the panel had received written notices in 2592 claims,[259] including one from the Native Hawaiian Legal Corporation, a public interest law firm advocating for Native Hawaiians, on behalf of all claimants who had not yet filed notices.[260]

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General, the Director of Budget and Finance, the Chair of the Hawaiian Homes Commission, and the panel chair.

[247] *Id.* (internal quotation marks omitted).

[248] *Id.* The panel then had until 1999 to review the claims.

[249] *Id.*

[250] *Id.*

[251] *Id.* The circuit court also enjoined Working Group members from "taking any further action in determining the formula for compensation." *Id.*

[252] *Id.*

[253] *Id.* at 92-93, 137 P.3d at 998-99.

[254] *Id.* at 93, 137 P.3d at 999.

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* The three individual plaintiffs in *Kalima v. State* also filed a complaint in federal district court on September 30, 1999, alleging, inter alia, violations of equal protection and due process. *Id.* at 93 n.12, 137 P.3d at 999 n.12 (citing Kalima v. Cayetano, No. CV 99-00671

On December 29, 1999, the plaintiffs[261] filed an action in circuit court, alleging, inter alia, that chapter 674 gave them a right to sue for damages caused by the State's breaches of trust.[262] The State argued that chapter 674 created a limited waiver of sovereign immunity and that the waiver had either "expired or lapsed before the conditions or prerequisites of the waiver were satisfied."[263] Ruling on the plaintiffs' motion for partial summary judgment, the circuit court determined that it had jurisdiction and that the plaintiffs had exhausted their administrative remedies, timely commenced their action in court, and were "aggrieved individual claimants," as defined in chapter 674.[264] The court held that the plaintiffs had a right to pursue their claims and had fulfilled all the prerequisites to do so; additionally, the court determined that the State had waived its sovereign immunity.[265]

The State appealed,[266] and on June 30, 2006, the Hawai'i Supreme Court affirmed.[267] The court began its analysis by detailing the procedures set forth in chapter 674.[268] Since chapter 674 established a process to resolve claims for past breaches of trust, the court believed that the entire chapter was remedial in nature and should be construed liberally.[269] The court additionally determined,

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HG-LEK (D. Haw. 1999)). The district court, however, eventually dismissed the case without prejudice. *Id.*

[261] While all the plaintiffs filed claims with the panel before the 1995 deadline, the plaintiffs were at various stages of the administrative process. *Id.* at 94, 137 P.3d at 1000. The panel had already adjudicated and processed the claims of 418 plaintiffs, but the Legislature had not provided these claimants any relief. *Id.* at 94 n.13, 137 P.3d at 1000 n.13. Raynette Ah Chong, Administrator of the Estate of Joseph Ching, represented this group. *Id.* Fifty-three plaintiffs, represented by Dianne Boner, had received advisory opinions from the panel, but these opinions had not yet been submitted to the Legislature. *Id.* Lastly, 2250 plaintiffs, represented by Leona Kalima, had filed their claims with the panel, but had not yet received an advisory opinion. *Id.*

[262] *Id.*

[263] *Id.* at 95, 137 P.3d at 1001.

[264] *Id.* at 96, 137 P.3d at 1002.

[265] *Id.* at 95-96, 137 P.3d at 1001-02. Moreover, the circuit court ruled that a 1995 law exempting the chapter 674 process from a global settlement of trust claims constituted an agreement binding the State and that plaintiffs could thus sue the State for breach of contract under Hawai'i Revised Statutes section 661-1. *Id.* at 96, 137 P.3d at 1002.

[266] *Id.* at 97, 137 P.3d at 1003. The State challenged the circuit court's finding that the State had waived its sovereign immunity for damages, breach of trust, and breach of contract, as well as the circuit court's rejection of the State's alternative argument that the plaintiffs' right to sue had expired or lapsed. *Id.*

[267] *Id.* at 107, 137 P.3d at 1013. The Hawai'i Supreme Court determined, however, that the circuit court erred when it granted the plaintiffs "the right to sue for breach of contract" under Hawai'i Revised Statutes chapter 661. *Id.* at 112, 137 P.3d at 1018.

[268] *Id.* at 98-100, 137 P.3d at 1004-06.

[269] *Id.* at 100, 137 P.3d at 1006.

however, that since the right-to-sue provision in chapter 674 was "part and parcel of a waiver of sovereign immunity," it should be strictly interpreted.[270]

The court first considered whether the plaintiffs' claims were barred by sovereign immunity.[271] The parties agreed that section 674-16 was "a specific waiver of the State's sovereign immunity and a consent to be sued for money damages for breaches of trust occurring between August 21, 1959 and June 30, 1988."[272] They also agreed that a claimant must have first complied with chapter 674's procedural requirements before gaining the right to sue.[273] The parties disagreed, however, "on the conditions of that waiver and whether the plaintiffs [had] met all of Chapter 674's requirements."[274] To evaluate the merits of these arguments, the court examined whether the plaintiffs had met all the requirements of chapter 674's waiver of immunity,[275] including whether the plaintiffs were "aggrieved individual claimant[s]."[276]

The State argued that individual claimants must have completed the entire administrative process before gaining the right to sue.[277] The plaintiffs countered that the statute only required (1) timely filing with the panel; (2) timely notice rejecting legislative action on claims; and (3) timely filing in circuit court.[278] The State insisted that the plaintiffs' claims were untimely because panel review and legislative 'action' upon each claim were "additional conditions precedent to the right to sue that were not completed prior to the statutory deadlines."[279]

The Hawai'i Supreme Court rejected the State's arguments, holding that both panel review and action by the Legislature were timely completed.[280] The court reasoned that the panel conducted an initial review to determine which of the 4327 timely filed claims to close or accept.[281] It then reviewed the accepted claims once more, and each claim that passed the investigation stage moved on to a final review and "determination of its probable merit and award of damages and/or corrective action."[282] Hence, the pending claims were the

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[270] *Id.*

[271] *Id.* at 100-01, 137 P.3d at 1006-07.

[272] *Id.* at 101, 137 P.3d at 1007.

[273] *Id.*

[274] *Id.*

[275] *Id.* In considering how it would review the statutory waiver of sovereign immunity, the court determined that "a statutory waiver of sovereign immunity must be clear and unequivocal and must be strictly construed." *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* at 102, 137 P.3d at 1008.

[279] *Id.*

[280] *Id.* at 102-06, 137 P.3d at 1008-12.

[281] *Id.* at 103-04, 137 P.3d at 1009-10.

[282] *Id.*

subject of an "on-going review process."[283] The court concluded that "[a]t the very least, we believe the accepted-claims were 'reviewed' each time the Panel prepared and submitted a report to the Legislature."[284]

The court next addressed "whether the legislature 'acted' upon each claim reported by the panel in its Final Report, thereby triggering the plaintiffs' right to sue" under chapter 674.[285] The State argued that according to the plain language and the legislative history of section 674-17, legislative action did not result from the Legislature's decision to *defer* action.[286] The court found that the legislative history and statutory construction of chapter 674 supported the conclusion that "the legislature's 'deferral' of its consideration of the Panel's recommendations after expiration of the statutory deadlines . . . was effectively . . . a denial of all claims, and, therefore an 'action' upon each claim."[287] The court explained that the State Senate, throughout the legislative process, had pushed for claimants to have a right to sue in court.[288] Even though an administrative step was added to the claims process, "the ultimate decision rested with the claimants as to whether the resolution of their claim by the administrative process was acceptable."[289] If the court required the Legislature "to do some affirmative 'act,' then the Legislature's 'deferral' of its actions until the applicable deadlines had passed would nullify [the judicial process] of the statute, leaving the plaintiffs with no remedy whatsoever."[290] The court deemed this result "absurd" in light of the purpose of the statute and the labors of the Legislature to meet this purpose.[291] The court reasoned that the Legislature desired to give claimants the right to sue, or else it would have expressly stated limitations in chapter 674 "and [would] not [have] left the choice to accept legislative relief in the hands of the claimants."[292]

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[283] *Id.* at 104, 137 P.3d at 1010. According to the court, there was an ongoing review process because: "[F]or purposes of providing a status report to the legislature, the pending accepted-claims were necessarily required to be reviewed in order to report them (1) in an appropriate category, *e.g.*, 'hearings pendings,' [sic] 'settlement negotiations,' 'on remand to hearings officer,' etc. or (2) formally submit them with the appropriate recommendations." *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.* at 105, 137 P.3d at 1011. The court had pointed out earlier that chapter 674 did not define "action," nor did it provide an "inclusive time period for any type of 'action,' other than the ultimate deadline of December 31, 1999, when a claimant must bring suit or be forever barred." *Id.* at 104-05, 137 P.3d at 1010-11.

[288] *See id.* at 105, 137 P.3d at 1011.

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.* The court also ruled that the waiver of sovereign immunity was not postponed until the governor examined the effect of the claims. *Id.*

The court acknowledged that the plaintiffs preserved their rights by timely filing notice rejecting legislative action and then filing suit before the October 1, 1999 statutory deadline.[293] The plaintiffs had met both conditions of panel "review" and legislative "action" required for "aggrieved individual claimant" status under the law.[294] Thus, the State's waiver of sovereign immunity was not extinguished, and the plaintiffs had a right to sue under chapter 674.[295]

Importantly, the court did not adopt a strict and narrow interpretation of the waiver of sovereign immunity. Rather, it interpreted the waiver in light of the chapter's overall remedial purpose. Indeed, the court appeared disturbed by the State's contentions that beneficiaries would have no recourse to the courts after fully participating in the administrative process. Thus, the court ensured that the Hawaiian Home Lands beneficiaries would at least have their claims heard after years of waiting not only on the DHHL waiting list, but also for a resolution to their breach of trust claims.

The Moon Court also decided two cases addressing the applicability of state law on Hawaiian Home Lands, generally finding that state health, safety, and welfare laws apply if they do not significantly affect use of the land for homesteading purposes. In *State v. Jim*, the court held that section 206 of the HHCA, which provides that the Governor's power over state lands does not extend to Hawaiian Home Lands, does not preclude the enforcement of state and county criminal laws on those lands.[296] The court interpreted section 206 to mean that the Governor cannot treat Hawaiian Home Lands like other state lands because they "cannot serve purposes at odds with the trust purposes," but this limitation "was never intended to limit the police power of the State."[297] The court acknowledged that the HHCA was designed to "rehabilitate the indigenous Hawaiians by facilitating their access to farm and homestead lands."[298] In reading the limitation in section 206 with this purpose in mind, the court concluded that "[t]he exercise of the State's inherent police power does not necessarily conflict with the responsibility to manage and dispose of these trust lands."[299] Although acknowledging that the "HHCA does not

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[293] *Id.* at 106, 137 P.3d at 1012.

[294] *Id.* The court also addressed the State's alternative argument that Hawai'i Revised Statutes section 674-17 was a "statute of repose" prohibiting the plaintiffs' claims filed in court after the *notice filing deadline* of October 1, 1999. The court's determination, however, that the plaintiffs had met the "Panel review and action by the legislature" prerequisites of Hawai'i Revised Statutes section 674-17(b) negated the defendants' argument. *Id.* at 106-07, 137 P.3d at 1012-13.

[295] *Id.* at 107, 137 P.3d at 1013.

[296] 80 Haw. 168, 171-72, 907 P.2d 754, 757-58 (1995).

[297] *Id.* at 171, 907 P.2d at 757.

[298] *Id.* (quoting Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216 (9th Cir. 1978)).

[299] *Id.*

expressly authorize the DHHL or any other entity to execute the laws on Hawaiian [H]ome [L]ands,"[300] the court concluded that the State has legislative authority with respect to Hawaiian Home Lands, even though Congress retains certain rights to alter, amend, or repeal the HHCA.[301]

In *Kepo'o v. Watson*, the Hawai'i Supreme Court considered whether Hawai'i's environmental impact statement (EIS) law[302] requirements apply to Hawaiian Home Lands.[303] In answering this question, the court determined that: Hawaiian Home Lands constitute "state lands"; the HHCA, although originally enacted by Congress, is a part of the Hawai'i Constitution so that federal preemption was not an issue; and, most importantly, Hawai'i's environmental protection law does not conflict with the HHCA.[304] Addressing the argument that the EIS law conflicts with the HHCA, the court stated that "police power regulations apply to Hawaiian [H]ome [L]ands, and executive officials may enforce them, as long as these regulations do not significantly affect the land."[305] The court reasoned that as an environmental law, the EIS requirement was also a police power regulation not significantly affecting the land, but instead involved "procedural and informational requirements" with only incidental effects on the land.[306] The court distinguished the incidental effects of the EIS statute from other laws, such as executive orders removing lands from the trust or county zoning ordinances that restrict DHHL in the use of trust land.[307] Accordingly, the EIS statute does not "affirmatively require DHHL to use the land for any particular purposes."[308] The court believed that the EIS law merely imposed a procedural requirement that ultimately served the best interest of trust beneficiaries.[309]

The Moon Court's decisions on the Hawaiian Home Lands trust have demonstrated a true regard for the rights of beneficiaries. The court in *Aged*

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[300] *Id.*

[301] *Id.* at 172, 907 P.2d at 758.

[302] HAW. REV. STAT. ch. 343 (1993).

[303] 87 Haw. 91, 95, 952 P.2d 379, 383 (1998).

[304] *Id.* at 98, 952 P.2d at 386.

[305] *Id.* at 99, 952 P.2d at 387 (citing State v. Jim, 80 Haw. 168, 907 P.2d 754 (1995)). The court also discussed Attorney General Opinion No. 95-05, which had concluded that state and federal endangered species laws imposing civil and criminal penalties apply to Hawaiian Home Lands. *Id.* In footnote 9, the court noted that the "Attorney General's opinions are highly instructive but are not binding upon this court. Thus, although we find the particular opinions cited in this decision to be persuasive in relation to the present case, we are not *required* to follow them." *Id.* at 99 n.9, 952 P.2d at 387 n.9 (emphasis in original).

[306] *Id.*

[307] *Id.* at 101-02, 952 P.2d at 389-90.

[308] *Id.* at 101, 952 P.2d at 389.

[309] *Id.* at 100, 952 P.2d at 388.

*Hawaiians*[310] and *Bush v. Watson*[311] recognized that beneficiaries on the waiting list have a "property interest" protectable under due process, held the State to the specific terms of the HHCA, and insured that beneficiary voices were heard. Similarly, in *State v. Jim*[312] and *Kepo'o v. Watson*,[313] the court struck a balance that showed a concern for beneficiaries but was also entirely consistent with the federal delegation to the State of responsibility for implementing the HHCA. In *Kalima*,[314] a unanimous decision authored by Chief Justice Moon, the court gave full meaning to the terms of a law that was originally meant to resolve long-standing trust breaches.[315] Instead of reading the act narrowly to preclude claims and protect the State from potentially high damages claims, the court recognized the remedial purpose of the law and the fact that the claimant beneficiaries had done everything possible to perfect their claims. In relation to the Hawaiian Home Lands trust, the Moon Court has continued on the path of justice, Ke Ala Pono, first charted by Chief Justice William S. Richardson, holding the State to the highest standards in dealing with trust beneficiaries.

## V. THE PUBLIC LAND TRUST[316]

Prior to 1978, the State had interpreted section 5(f) of the Admission Act[317] to require only that the proceeds and income from trust lands be used for the fulfillment of any *one* of the five trust purposes; trust proceeds were primarily directed toward public education.[318] At the 1978 Constitutional Convention, however, the Hawaiian Affairs Committee sought to clarify and implement the Admission Act's trust language as it relates to Native Hawaiians.[319] As a result, three new sections were added to the constitution, fundamentally altering the State's role in implementing section 5(f)'s trust language.

Article XII, section 4 of the Hawai'i Constitution specified that the lands granted to the State by section 5(b) of the Admission Act, with the exception of

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[310] Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Haw. 192, 891 P.2d 279 (1995).

[311] 81 Haw. 474, 918 P.2d 1130 (1996).

[312] 80 Haw. 168, 907 P.2d 754 (1995).

[313] 87 Haw. 91, 952 P.2d 379 (1998).

[314] Kalima v. State, 111 Haw. 84, 137 P.3d 990 (2006).

[315] *Id.* at 98-101, 137 P.3d at 1004-07.

[316] Some text in this section has previously appeared in other publications, including MacKenzie, *The Lum Court*, *supra* note 4, and Melody Kapilialoha MacKenzie, *The Ceded Lands Trust*, *in* HANDBOOK, *supra* note 13, at 26.

[317] Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6.

[318] LEGISLATIVE AUDITOR, FINAL REPORT ON THE PUBLIC LAND TRUST, AUDIT REPORT NO. 86-17, at 14 (Dec. 1986).

[319] *See generally* HAWAIIAN AFFAIRS COMM. REP. NO. 59 *and* COMM. OF THE WHOLE REPORT NO. 13, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 643, 1017 (1980).

Hawaiian Home Lands, were to be held by the State as a public trust for two beneficiaries: Native Hawaiians[320] and the general public.[321] Another section established the Office of Hawaiian Affairs (OHA), to be governed by a nine-member board of trustees and to hold assets in trust for Native Hawaiians and Hawaiians.[322] A final section ensured that OHA's trust assets would include a pro rata portion of the income and proceeds from lands identified in article XII, section 4.[323]

### *A. Public Land Trust Revenues*

Native Hawaiians have not been successful, either legislatively or through the courts, in gaining a consistent and unambiguous answer to what constitutes a pro rata share of the public land trust revenues. Although the 1978 constitutional amendments provide that OHA should receive a pro rata share of the income and proceeds from the trust, the Hawai'i Supreme Court has thus far declined to judicially protect that right, instead relying on the legislative

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[320] The Constitutional Convention structured the Office of Hawaiian Affairs (OHA) as the entity to receive and administer a share of the public land trust funds designated in section 5(f) for the betterment of the conditions of Native Hawaiians, as defined in the HHCA. *See id.* The HHCA defines Native Hawaiians as those of not less than half aboriginal Hawaiian ancestry. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 201(a), 42 Stat. 108, 108 (1921). The OHA amendment names two beneficiaries of the OHA trust—Native Hawaiians (those with fifty percent or more Hawaiian ancestry) and Hawaiians (those with any quantum of Hawaiian ancestry). HAW. CONST. art. XII, § 5; HAW. REV. STAT. § 10-2 (2009). OHA's public land trust funds have largely been utilized to benefit the Native Hawaiian community as a whole. *See* Day v. Apoliona, 616 F.3d 918, 924-25 (9th Cir. 2010) (determining that *federal law* does not require the OHA trustees to use section 5(f) trust funds solely for the benefit of Native Hawaiians of fifty percent or more Hawaiian ancestry; those funds can be utilized for any of the five trust purposes). Moreover, the *Day v. Apoliona* court held that the OHA trustees have broad discretion to decide how to serve those purposes. *Id.* at 926-27.

[321] HAW. CONST. art. XII, § 4 provides:

> PUBLIC TRUST. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

[322] *Id.* art. XII, § 5.

[323] *Id.* art. XII, § 6 provides, in part:

> The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, *including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians* . . . .

(Emphasis added).

process to resolve these difficult questions.[324] This may be an indication of the Moon Court's concern for the potential impact on the state treasury as well as its willingness to defer to the legislative branch. Even in these decisions, however, the Moon Court consistently emphasized that the State's obligation to Native Hawaiians is firmly rooted in the Hawai'i Constitution.

Soon after OHA's creation in 1978, the 1980 State Legislature set OHA's share of the public land trust proceeds and income at twenty percent.[325] Even after that enactment, however, disputes over the classification of specific parcels of land as ceded or non-ceded, questions as to whether section 5(f) contemplates gross or net income, and problems in defining "proceeds" plagued the State and hampered OHA's efforts to provide benefits to the Native Hawaiian community.[326] In 1983 and 1984, the OHA trustees filed two suits, seeking clarification of the law setting OHA's pro rata share at twenty percent.[327] In 1987, the Hawai'i Supreme Court in *Trustees of the Office of Hawaiian Affairs v. Yamasaki* dismissed OHA's claims based on the political question doctrine, finding the issues "'to be of a peculiarly political nature and therefore not meet for judicial determination.'"[328]

In 1990, OHA and the State reached a settlement of the trust revenue dispute, eventually embodied in Act 304,[329] defining both the trust res and trust revenues. Act 304 segregated revenue from trust lands into two categories—sovereign and proprietary revenue.[330] Act 304 defined sovereign revenue, which was not subject to the OHA trust provision, as the revenue generated as an exercise of governmental or sovereign power.[331] The sovereign revenue category included personal and corporate income taxes, general excise taxes, fines collected for violations of state law, and federal grants or subsidies.[332] Proprietary revenue, which was subject to the OHA trust provision, was

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[324] See *infra* discussion of *Office of Hawaiian Affairs v. State (OHA I)*, 96 Haw. 388, 31 P.3d 901 (2001), *Office of Hawaiian Affairs v. State (OHA II)*, 110 Haw. 338, 133 P.3d 767 (2006), and *Office of Hawaiian Affairs v. Hawaii State Legislature*, No. 30535, 2010 Haw. LEXIS 184 (Aug. 18, 2010).

[325] Act of June 16, 1980, No. 273, 1980 Haw. Sess. Laws 525 (codified as amended at HAW. REV. STAT. § 10-13.5 (2009)).

[326] *See* LEGISLATIVE AUDITOR, *supra* note 318, at 109 (indicating that if one category of disputed lands had been included in the trust, revenues to OHA would have increased by $1.7 million a year).

[327] Trs. of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 165-166, 737 P.2d 446, 453 (1987). The court consolidated the two cases for hearing and disposition. *Id.* at 167, 737 P.2d at 454.

[328] *Id.* at 175, 737 P.2d at 458 (quoting Colegrove v. Green, 328 U.S. 549, 552 (1946)).

[329] Act of July 3, 1990, No. 304, 1990 Haw. Sess. Laws 947.

[330] *Id.* § 3, 1990 Haw. Sess. Laws at 948-49.

[331] *Id.*

[332] *Id.*

defined as the income generated from the use or disposition of the public trust lands.[333] Included in this category were rents, leases, and licenses for the use of trust lands, minerals, and runway landing fees.[334] In addition, Act 304 defined revenue as those generated by activities from "the actual use" of trust lands.[335]

Although Act 304 appeared to settle many of the OHA entitlement issues, not all issues had been resolved.[336] OHA returned to state court in 1994 seeking an accounting and restitution of a pro rata portion of disputed public land trust revenues.[337] The disputed revenues included lease payments from Honolulu International Airport's duty-free concession agreements, including payments based on receipts from the Waikīkī duty-free store (DFS), and other proceeds and rents.[338] On a motion for partial summary judgment, the circuit court found in favor of OHA and denied the State's motion to dismiss the action.[339] The State appealed.

While the case was on appeal to the Hawai'i Supreme Court, Congress passed the 1998 "Forgiveness Act," waiving repayment of past diversions from airport revenues made for the betterment of Native Hawaiians and forbidding any further payments.[340] The Forgiveness Act specifically stated that nothing in its terms should be construed to affect trust obligations or state statutes defining the obligations to Native Hawaiians.[341]

In the 2001 case, *Office of Hawaiian Affairs v. State* (*OHA I*), the Hawai'i Supreme Court first determined that Act 304 required that airport revenues, including concessionaire rent and fees, be paid to OHA.[342] The court examined the plain language of Act 304's definition of revenue as including rents derived from any lease resulting from the actual use of trust lands.[343] The court

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[333] *Id.*

[334] *Id.* § 3, 1990 Haw. Sess. Laws at 949.

[335] *Id.*

[336] Paragraph 7 of the agreement between OHA and the Office of State Planning (OSP), which represented the State in the negotiations, acknowledges that the settled amount "does not include several matters regarding revenue which OHA has asserted is due to OHA and which OSP has not accepted or agreed to." Memorandum of Understanding at 9 (April 28, 1993) (on file with author).

[337] Office of Hawaiian Affairs v. State (*OHA I*), 96 Haw. 388, 392, 31 P.3d 901, 905 (2001).

[338] OHA sought its pro rata share of revenues from "(1) Waikiki Duty Free receipts (in connection with the lease of ceded lands at the Honolulu International Airport); (2) Hilo Hospital patient services receipts; (3) receipts from the Hawai'i Housing Authority and the Housing Finance and Development Corporation for projects situated on ceded lands; and (4) interest earned on withheld revenues." *Id.*

[339] *Id.* at 388, 31 P.3d at 901.

[340] Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 340(b)-(c), 111 Stat. 1425, 1448 (1998).

[341] *Id.* § 340(d), 111 Stat. at 1449.

[342] *OHA I*, 96 Haw. at 395, 31 P.3d at 908.

[343] *Id.*

carefully analyzed the agreement between DFS and the State, concluding that the rent paid was for the "actual use" of the airport premises.[344]

Having found in OHA's favor on the major underlying claim, the court then considered whether there was a conflict between the Forgiveness Act's prohibition *against* payment from airport revenues and Act 304's requirement that airport revenues be paid to OHA.[345] OHA argued that the savings clause in the Forgiveness Act required the State to pay the airport revenue from another fund.[346] The savings clause stated, "Nothing in this Act shall be construed to affect any . . . statute . . . that define[s] the obligations of [the State] to . . . Native Hawaiians . . . in connection with ceded lands, except to make clear that airport revenues may not be used to satisfy such obligations."[347] The court rejected OHA's argument, concluding that "the savings clause provides that state statutes shall not be interfered with, except where those statutes provide for payment of airport revenues to satisfy the State's obligations. Because Act 304 obligates the State to pay airport revenues to OHA in this case, the savings clause cannot 'save' Act 304."[348]

OHA also pointed to state law providing OHA trustees with the power to "manage, invest, and administer . . . all income" received by the office equivalent to that pro rata portion[349] derived from the ceded lands and another provision that contained similar language[350] to argue that the State had the ability to pay OHA "equivalent" amounts.[351] The court made short shrift of this argument, concluding that an express and clear statement by the Legislature was required—a statement not found in Act 304 or its legislative history—to "appropriate" funds from other sources to OHA.[352]

Act 304 contained a non-severability clause, stating that any provision held to be in conflict with federal law would invalidate the entire act.[353] The non-severability clause also provided that if Act 304 was invalidated, the immediately preceding version of state law on OHA's entitlement would be reinstated.[354] The court held that Act 304 was invalid, and the prior state law, a law already found to have no judicially discoverable and manageable standards

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[344] *Id.*

[345] *Id.* at 397, 31 P.3d at 910.

[346] *Id.*

[347] *Id.* (citing Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448 (1998)).

[348] *Id.*

[349] HAW. REV. STAT. § 10-5(1) (1993).

[350] Hawai'i Revised Statutes section 10-13(b), as amended by Act 304, also used similar "equivalent to" language and was cited in *OHA I*, 96 Haw. at 394, 31 P.3d at 907.

[351] *OHA I*, 96 Haw. at 398, 31 P.3d at 911.

[352] *Id.* at 398-99, 31 P.3d at 911-12.

[353] Act of July 3, 1990, No. 304, § 16, 1990 Haw. Sess. Laws 947, 953.

[354] *Id.*

in the 1987 *Yamasaki* case, was automatically reinstated.[355] The court then determined that the case presented a non-justiciable political question.[356]

Although it invalidated Act 304, the court acknowledged that the State's obligation to Native Hawaiians is firmly established in the state constitution, stating that "it is incumbent upon the legislature to enact legislation that gives effect to the rights of native Hawaiians to benefit from the ceded lands trust."[357]

In 2003, OHA again brought suit, contending that Act 304 constituted a contract between the State and OHA that the State had breached.[358] OHA also argued that the State breached its fiduciary duties by not challenging the Federal Aviation Administration memorandum leading to the passage of the Forgiveness Act and invalidation of Act 304, and by failing to inform OHA of these relevant facts.[359] In *Office of Hawaiian Affairs v. State* (*OHA II*), the Hawai'i Supreme Court held that there was no language in Act 304 evidencing a legislative intent to create a contract.[360]

In reviewing OHA's claim that the State had breached its trust duty to deal impartially with beneficiaries and to inform them of its decisions regarding actions in response to the federal government's position on airport revenues, the court found that under the proper circumstances, OHA could have brought the breach of trust claims[361] under Hawai'i Revised Statutes chapter 673, which waives the State's sovereign immunity for such claims.[362] The court

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[355] *OHA I*, 96 Haw. at 399, 31 P.3d at 912.

[356] *Id.* at 401, 31 P.3d at 914.

[357] *Id.* Immediately after the Hawai'i Supreme Court's decision, the State stopped all trust land revenue payments to OHA. *See* Debra Barayuga, *OHA Sues to Resume Land Revenues*, HONOLULU STAR-BULLETIN, July 22, 2003, *available at* http://archives.starbulletin.com/2003/07/22/news/story5.html. Soon after Governor Linda Lingle took office in 2003, she issued an executive order restoring trust land revenue payments to OHA. Executive Order 03-03 (February 11, 2003) (on file with author). The 2003 Hawai'i State Legislature appropriated funds for back payments to OHA for the revenue that was discontinued after the *OHA I* decision. Act of April 23, 2003, No. 34, 2003 Haw. Sess. Laws 46.

[358] Office of Hawaiian Affairs v. State (*OHA II*), 110 Haw. 338, 346-47, 133 P.3d 767, 775-76 (2006).

[359] *Id.* at 355, 133 P.3d at 784.

[360] *Id.* at 354, 133 P.3d at 783.

[361] *Id.* at 356, 133 P.3d at 785.

[362] HAW. REV. STAT. § 673-1 (1993) provides:

(a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions from its agents, officers or employees in the management and disposition of trust funds and resources of:

. . .

(2) the native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

And shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

determined, however, that OHA failed to follow the notice requirements of the law.[363] The court also rejected OHA's argument that the two-year statute of limitations did not apply.[364] The court found that OHA did not fall within the law's exception for state entities since, under Hawai'i law, OHA is entitled to sue, and did in fact sue in OHA's corporate capacity, *not* as a state entity.[365]

Although finding OHA's breach of trust claims barred, the court reiterated its earlier call in *OHA I* for the Legislature to implement the trust provisions of the Hawai'i Constitution. Indeed, the court quoted from U.S. Senator Daniel Inouye's speech during Senate floor debates on the Federal Forgiveness Act:

> The airports continue to sit on ceded lands, the State's obligation to compensate OHA for the use of the land upon which the airports sit should also continue . . . . In light of the unique history of Hawaii's ceded lands and the obligations that flow from these lands for the betterment of the Native Hawaiian people, I believe that this is more than a fiscal matter, this is a fiduciary matter—one of trust and obligation . . . .[366]

In June 2010, in an original action in the Hawai'i Supreme Court, OHA asked the Hawai'i Supreme Court to require the 2011 Legislature to clarify the amount of past due "ceded lands" funding that should be transferred to OHA.[367] Two months later, the Hawai'i Supreme Court denied the request,[368] stating that OHA had failed to demonstrate that it had "a clear and indisputable right" to relief.[369] To have that right to relief, OHA would have had to establish that the Legislature's action on the issue would be "ministerial" in nature; in other words, the law prescribing the Legislature's duty would have had to set forth the duty "with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[370]

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The State contended that Hawai'i Revised Statutes section 673-9, which provides that chapter 673 "shall not apply to suits in equity or law brought by or on behalf of [OHA] in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to [OHA] by the legislature," barred OHA's suit. *OHA II*, 110 Haw. at 358, 133 P.3d at 787. The Moon Court held, however, that the action did not involve the proportionate share of OHA's revenues, since that amount had been set by the Legislature. *Id.* The court determined that the "damages resulting [are] from the State's breach of trust duties and do not require a determination of OHA's proportionate share of revenues." *Id.*

[363] *OHA II*, 110 Haw. at 358-59, 133 P.3d at 787-88.

[364] *Id.*

[365] *Id.* at 359-60, 133 P.3d at 788-89.

[366] *Id.* at 366, 133 P.3d at 795.

[367] Petition for Writ of Mandamus, Office of Hawaiian Affairs v. Haw. State Legislature, No. 30535 (June 2, 2010) (on file with author).

[368] Office of Hawaiian Affairs v. Haw. State Legislature, No. 30535, 2010 Haw. LEXIS 184, at *1 (Aug. 18, 2010).

[369] *Id.*

[370] *Id.* at *2.

In 2006, the Legislature set the interim revenue to be transferred to OHA from the public land trust as $15.1 million annually beginning with the 2005-06 fiscal year and authorizing a one-time payment of $17.5 million for prior underpayments.[371] OHA continues to receive only $15.1 million per year in lieu of the twenty percent pro rata share established by earlier law.[372] Nevertheless, in a positive development and after several failed attempts, in 2012 all claims for back revenue, from the date of OHA's establishment in 1978 through June 30, 2012, were settled through the State's conveyance of 10 parcels of mostly waterfront property in Kaka'ako, Honolulu, to OHA.[373] Thus, in the area of trust revenues, the Moon Court's unambiguous recognition of the State's constitutional responsibilities combined with its deferral to the legislative branch have begun to yield substantial benefit to OHA and its beneficiaries.

### *B. Moratorium on the Alienation of the Public Land Trust*[374]

The contours of the State's fiduciary responsibility in relation to the public land trust or "ceded" lands have not been well defined by the state or federal courts. The Hawai'i Supreme Court, however, was given the opportunity to more clearly delineate the trust duties in a 2008 case, *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i (HCDCH I)*.[375] In this landmark decision addressing Hawai'i's contested relationship with the United States, the significance of 'āina to the Native Hawaiian people, and the meaning of apology and reconciliation, the Moon Court placed a moratorium on the sale or transfer of trust lands until the Native Hawaiian community's unrelinquished claims to those lands could be resolved.

The case began in 1994, when the Housing Finance and Development Corporation (HFDC),[376] a state-created corporation established to ensure low-

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[371] Act of June 7, 2006, No. 178, 2006 Haw. Sess. Laws 702. Act 178 also contained a disclaimer clause stating, "[n]othing in this Act shall resolve or settle, or be deemed to acknowledge the existence of, the claims of native Hawaiians to the income and proceeds" of a pro rata portion of the public land trust. *Id.* § 7.

[372] *Id.* § 2.

[373] The settlement is embodied in Act of April 11, 2012, No. 15, 2012 Haw. Sess. Laws 24.

[374] An earlier version of some of the material in this section can be found in an article written by 2008 William S. Richardson School of Law graduate Moanikeala Crowell Colon entitled *Ho'oholo Imua—Towards Reconciliation?* in KA HE'E (Summer 2008) and is used with permission. The article is available at http://www2.hawaii.edu/~nhlawctr/article5-4.htm (last visited Mar. 3, 2011).

[375] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH I*), 117 Haw. 174, 177 P.3d 884 (2008).

[376] *Id.* at 187, 177 P.3d at 897 (noting that the original agency involved in the action was the Housing Finance and Development Corporation (HFDC)). In 1997, the Legislature

income housing development, was in the process of transferring two parcels of trust lands—one at La'i 'Ōpua on Hawai'i island and another at Leiali'i on Maui—to private developers for residential housing.[377] Transfers of trust lands had occurred before, but this was the first proposed transfer after Congress' passage of the 1993 Apology Resolution[378] and similar state legislation recognizing the Hawaiian community's potential claims to the trust lands.[379]

In the Apology Resolution, Congress apologized to the Native Hawaiian people for the overthrow of the Kingdom of Hawai'i with the participation of agents and citizens of the United States and expressed its "commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."[380] Congress specifically recognized that the Government, Crown, and public lands of Hawai'i were taken without the consent of or compensation to the Native Hawaiian people or their sovereign government and that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[381]

Based on the state legislation and the Apology Resolution, in 1994 OHA and four individual plaintiffs sued the HFDC board members and state officials to stop the transfer of the lands.[382] In *HCDCH I*, the plaintiffs sought to enjoin the State from alienating the two parcels or any lands from the trust.[383] Alternatively, the plaintiffs sought a declaration that transferring or selling trust lands would not limit future claims by Native Hawaiians to the lands.[384]

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consolidated HFDC and the Hawai'i Housing Authority into the Housing and Community Development Corporation of Hawai'i (HCDCH); in 2006, the Legislature divided HCDCH into two separate agencies. *HCDCH I*, 117 Haw. at 187-88 n.9, 177 P.3d at 897-98 n.9. Since this action commenced before these legislative changes, the court used the designation HFDC throughout its opinion and this article will follow the same convention. *See id.*

[377] *Id.* at 187-88, 177 P.3d at 897-98 (discussing the history of the parcels). The La'i 'Ōpua parcel was subsequently transferred to the Department of Hawaiian Home Lands. *Id.* at 181 n.4, 177 P.3d at 891 n.4. *See also* Andrew Gomes, *Liliuokalani Trust Objects to Big Isle Housing Project*, HONOLULU STAR-ADVERTISER, Nov. 5, 2010, *available at* http://www.staradvertiser.com/business/businessnews/20101105_Liliuokalani_trust_objects_to_Big_Isle_housing_project.html.

[378] Apology Resolution, *supra* note 1, Pub. L. No. 103-150, 107 Stat. 1510.

[379] *See infra* text accompanying notes 429-30.

[380] Apology Resolution, *supra* note 1, § 1(4), 107 Stat. at 1513.

[381] *Id.* "whereas" cl. 29, 107 Stat. at 1512.

[382] The OHA plaintiffs filed a complaint in the First Circuit Court on November 4, 1994, and the individual plaintiffs filed a complaint in the Second Circuit Court on November 9, 1994. *HCDCH I*, 117 Haw. at 188 n.12, 177 P.3d at 898 n.12. When the First Amended Complaint was filed in August 1995, the individual plaintiffs and their claims were added to those of the OHA plaintiffs in the First Circuit action. *Id.*

[383] *Id.* at 188, 177 P.3d at 898.

[384] *Id.* at 181, 177 P.3d at 891.

In 2002, the trial court issued a lengthy opinion determining that the plaintiffs' claims were barred by a number of jurisdictional and other defenses, including sovereign immunity, waiver and estoppel, and justiciability considerations—specifically, political question, ripeness, and the mandate against advisory opinions.[385] The trial court also concluded that the State had the express authority to alienate trust lands.[386]

OHA argued, among other things, that the State could not alienate trust lands because of its trust responsibilities to the Native Hawaiian people and its duty to address and resolve their pending claims.[387] In his 2008 unanimous decision, Chief Justice Ronald T.Y. Moon gave substance to the State's commitment to reconciliation with the Native Hawaiian community by prohibiting the State from alienating trust lands until the claims of the Native Hawaiian people to those lands had been resolved.[388]

As in other cases involving Native Hawaiian claims, the Hawai'i Supreme Court first addressed a number of procedural and jurisdictional issues. The court first reviewed the State's contention that, based on a memorandum opinion issued in a 1998 case, *Ewa Marina*,[389] the plaintiffs were collaterally estopped from re-litigating the issue of the State's power to alienate ceded lands from the trust. In *Ewa Marina*, a case in which OHA was a party, the court indicated that the State had the authority to sell ceded lands if such a sale promoted a valid public purpose and the revenues generated were used for the trust purposes set forth in section 5(f) of the Admission Act.[390] The parties in *Ewa Marina*, however, had not raised or briefed the issue of the sale of ceded lands because the case dealt with the grant of a Conservation District Use Area (CDUA) permit.[391] The Hawai'i Supreme Court noted that the issue in the *Ewa Marina* case was not identical to the issue raised in *HCDCH I*.[392] Moreover, whether an injunction should be issued was not essential to the final judgment in *Ewa Marina* because there, the court only needed to determine whether the State had violated its fiduciary duties by issuing the CDUA.[393]

The court then addressed the contention that the plaintiffs' claims relating to the Leiali'i parcel were barred by sovereign immunity because title to the parcel had already been transferred to HFDC and, under applicable law, was no longer

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[385] *Id.* at 189, 177 P.3d at 899.

[386] *Id.*

[387] *Id.* at 188, 177 P.3d at 898.

[388] *Id.*

[389] Trs. of Office of Hawaiian Affairs v. Bd. of Land & Natural Res. (*Ewa Marina*), No. 19774, 87 Haw. 471, 959 P.2d 841 (Mar. 12, 1998).

[390] *HCDCH I*, 117 Haw. at 196, 177 P.3d at 906.

[391] *Id.*

[392] *Id.*

[393] *Id.* at 197, 177 P.3d at 907.

public land.[394] Thus, the State argued, it would have to expend funds to return the parcel to the trust; moreover, HFDC had already spent $31 million improving the parcel.[395] Citing the *Pele Defense Fund v. Paty* case, the court stated that it had adopted a rule that makes an important distinction between prospective and retrospective relief:

> *If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury.* However, relief that is tantamount to an award of damages for a past violation of law, even though styled as something else, is barred by sovereign immunity.[396]

The court reviewed cases where it determined that sovereign immunity barred a particular claim as well as those in which sovereign immunity was not a bar because the effect on the state treasury, if any, would be "ancillary."[397] Applying those cases to the plaintiffs' claims related to the Leiali'i parcel, the court recognized that the $31 million HFDC had spent developing infrastructure on the property was significant.[398] Nevertheless, the court believed that sovereign immunity was not a bar to the plaintiffs' claims because the benefit of those improvements would inure to the State and the plaintiffs were not asking that the $31 million be returned to them, or even to the State.[399] Thus, the court characterized the effect on the state treasury as substantial but "ancillary."[400]

The court next turned to the doctrines of waiver and estoppel in relation to the Leiali'i parcel. The circuit court had determined that OHA and the individual plaintiffs had waived their right to contest the land sale because of their actions and inactions between 1987, when HFDC first proposed use of the Leiali'i parcel for low-income housing development, and 1994, when the plaintiffs filed suit.[401] The Hawai'i Supreme Court determined, however, that the plaintiffs, although aware of the potential sale of the parcel since at least 1989, did not have knowledge of the United States' admissions and the full extent of the Native Hawaiian claim to the ceded lands until the adoption of the Apology Resolution and related state legislation in 1993.[402] Since a waiver

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394 *Id.*

395 *Id.*

396 *Id.* at 198, 177 P.3d at 908 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 608-10, 837 P.2d 1247, 1266 (1995) (emphasis in original) (citations, ellipses, footnotes, and internal quotation marks omitted)).

397 *Id.* at 198-99, 177 P.3d at 908-09.

398 *Id.* at 200, 177 P.3d at 910.

399 *Id.*

400 *Id.*

401 *Id.*

402 *Id.* at 202, 177 P.3d at 912.

requires a knowing or intentional relinquishment of a right or claim, the court determined that the plaintiffs had not waived their right to seek an injunction on the sale of the Leiali'i parcel.[403] Similarly, in addressing whether the plaintiffs were estopped from seeking an injunction because they had failed to object to the sale earlier and, in OHA's case, had undertaken negotiations for OHA's pro rata share of revenue from the sale, the court found it significant that "equitable estoppel requires proof that one person willfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous belief to his or her detriment."[404] Here, the court concluded, it was not until the Apology Resolution was signed into law that the plaintiffs' claims "regarding the State's explicit fiduciary duty to preserve the corpus" of the trust arose and thus, it was not until that time that the plaintiffs' claims could have been actionable.[405]

The court then disposed of several important jurisdictional issues related to the ceded lands in general, as opposed to the Leiali'i parcel in particular. The circuit court had determined that sovereign immunity barred the plaintiffs' injunction request because the State had not consented to be sued "in a lawsuit contesting the validity of its title to the ceded lands."[406] In addition, the circuit court had examined the effect of the plaintiffs' claim for relief, characterizing it as "depriving the State of control over public lands . . . [which] is the 'functional equivalent of a quiet title action,' . . . barred by sovereign immunity."[407] The Hawai'i Supreme Court, however, saw a distinction between an action asking the court to transfer the lands to the plaintiffs' possession, which is clearly analogous to a quiet title action, and this case, in which the plaintiffs sought an injunction barring the "future alienation" of trust lands until their unrelinquished claims could be resolved.[408] As such, the court concluded that the plaintiffs' claims were prospective in nature and not barred by sovereign immunity.[409]

The court then turned to the State's contention that the claim was not "ripe." The court examined the two prongs of the ripeness doctrine, which it characterized as "peculiarly" a matter of timing:[410] (1) whether the issue is fit for judicial resolution because the issue is primarily legal, needs no further

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[403] *Id.*

[404] *Id.* at 203, 177 P.3d at 913 (quoting Potter v. Haw. Newspaper Agency, 89 Haw. 411, 419, 974 P.2d 51, 59 (1999)).

[405] *Id.*

[406] *Id.* at 204, 177 P.3d at 914.

[407] *Id.*

[408] *Id.* at 206, 177 P.3d at 916.

[409] *Id.*

[410] *Id.*

factual development, and involves a final agency action; and (2) the potential hardship to the plaintiffs if the court does not act.[411]

The court concluded that the plaintiffs' request for an injunction was ripe for adjudication.[412] In addressing the first prong, the court noted that the plaintiffs were not seeking a determination as to whether Native Hawaiians are entitled to ownership of the lands, but merely "a determination [on] whether an injunction is appropriate to allow for a resolution of their claims without further diminishment of the trust res."[413] In the court's view, there was "no doubt that the issuance of an injunction involves a legal question."[414] Moreover, the court indicated, the record demonstrated that there was no need for further factual development.[415] With regard to the Leiali'i parcel, the parcel had been transferred to HFDC so a final agency action had been taken.[416] "[A]lthough 'final agency action' with regard to the ceded lands in general ha[d] yet to be taken," the court found that the very nature of the plaintiffs' requested relief dictated that a judicial decision regarding an injunction was appropriate.[417] Regarding the second prong, the potential hardship to the plaintiffs, the court emphasized that "[o]nce the ceded lands are alienated from the public lands trust, they [would] be lost forever" and would not be "available to satisfy the unrelinquished claims of [N]ative Hawaiians."[418] The court concluded that "the loss of the land itself entails a much greater injury 'than possible financial loss.'"[419]

In rejecting the State's contention that the case presented a non-justiciable political question, the court distinguished the underlying claim for return of the ceded lands with the plaintiffs' request for an injunction to preserve the lands until a political resolution could be reached.[420] The court stressed that the plaintiffs did not seek a judicial resolution of the underlying claim for the lands, but instead asked for protection of trust assets while the political branches resolved the dispute.[421] The court concluded that "[t]his modest goal is well within the domain of the judiciary[.]"[422]

On the merits, the court's decision was grounded in its interpretation of the 1993 Apology Resolution, as well as Hawai'i laws recognizing the claims of

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411 *Id.* at 207, 177 P.3d at 917.
412 *Id.* at 209, 177 P.3d at 919.
413 *Id.* at 208, 177 P.3d at 918.
414 *Id.*
415 *Id.*
416 *Id.*
417 *Id.*
418 *Id.*
419 *Id.*
420 *Id.*
421 *Id.*
422 *Id.* at 210, 177 P.3d at 920.

the Native Hawaiian people to the lands. The court rejected the State's position that the Apology Resolution was a mere policy statement, declaring that the Apology Resolution had the force of law because it resulted from legislative deliberations.[423] The court concluded that while the Apology Resolution did not require that trust lands be transferred to the Native Hawaiian people, it did recognize their unrelinquished claims to the lands.[424]

Moreover, the court reasoned, the Apology Resolution and analogous state legislation implicated the State's fiduciary duty to preserve the trust lands until the claims of the Native Hawaiian community are resolved.[425] Relying on its earlier explication of the State's trust duties in *Ahuna v. Department of Hawaiian Home Lands*[426] and *Pele Defense Fund v. Paty*,[427] the court stated that "[s]uch duty is consistent with the State's 'obligation to use reasonable skill and care' in managing the public lands trust" and that "the State's conduct 'should . . . be judged by the most exacting fiduciary standards.'"[428]

Although the court relied on the Apology Resolution for its factual determinations, the court separately grounded its decision in Hawai'i law. The court specifically pointed to Acts 354 and 359, both passed in 1993, in which the State Legislature recognized that "the indigenous people of Hawai'i were denied . . . their lands" and made other findings similar to those of the Apology Resolution.[429] The court also found support for its decision in a 1997 law, Act 329, designed to clarify the proper management of lands in the public land trust, and another 1993 law, Act 340, requiring that the island of Kaho'olawe be held in trust and transferred to a sovereign Native Hawaiian entity in the future.[430]

The court summed up:

> In this case, Congress, the Hawai'i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and (4) once any ceded lands are alienated from the public land trust, they will be gone forever.[431]

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[423] *Id.* at 191, 177 P.3d at 901.

[424] *Id.* at 192, 177 P.3d at 902.

[425] *Id.* at 210, 177 P.3d at 920.

[426] 64 Haw. 327, 640 P.2d 1161 (1982).

[427] 73 Haw. 578, 837 P.2d 1247 (1992).

[428] *HCDCH I*, 117 Haw. at 195, 177 P.3d at 905 (quoting *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169).

[429] *Id.* at 193-94, 177 P.3d at 903-04 (quoting Act of July 1, 1993, No. 359, § 1(9), 1993 Haw. Sess. Laws 1009, 1010).

[430] *Id.* at 194, 177 P.3d at 904.

[431] *Id.* at 213, 177 P.3d at 923.

The court then turned to whether a permanent injunction should be issued, stating, "without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts."[432] Significantly, the court recognized that money reparations in lieu of the lands themselves would not be an adequate remedy because of the inextricable bond between the Native Hawaiian people and the land or 'āina.[433]

Ultimately, the court found that the plaintiffs had met all the requirements for an injunction "pending final resolution of native Hawaiian claims through the political process."[434] The court sent the case back to the trial court with instructions to issue an order granting an injunction prohibiting the defendants from selling or otherwise transferring the specific lands involved and any other lands from the public land trust until the claims of Native Hawaiians to the trust lands have been resolved.[435]

The State sought review by the U.S. Supreme Court, arguing that the Hawai'i court's decision cast a cloud on the State's title to the trust lands and contravened both the 1898 Joint Resolution of Annexation and the 1959 Admission Act.[436] In *Hawaii v. Office of Hawaiian Affairs*, the United States Supreme Court, in a unanimous 2009 opinion, reversed and remanded.[437] The Court first determined that a federal question existed, pointing out that the

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[432] *Id.* at 214, 177 P.3d at 924.

[433] *Id.* The court stated, "Although an argument could be made that monetary reparations would be the logical remedy for such loss, we are keenly aware—as was Congress—that 'the health and well-being of the native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.'" *Id.* (citation omitted and emphasis removed).

[434] *Id.* at 218, 177 P.3d at 928.

[435] *Id.*

[436] Initially, the State's petition for certiorari contended that the Apology Resolution was merely an expression of policy and that by construing the federal government's apology "to impair Hawaii's sovereign prerogatives, the Hawaii Supreme Court badly misconstrued congressional intent and raised grave federalism concerns." Petition for Writ of Certiorari at 3, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 1934869 at *3. Subsequently, in briefing on the merits, the State argued, among other things:

> The [Hawai'i Supreme C]ourt enjoined any sales of the ceded lands on the theory that title might actually belong not to the State, but to "the Native Hawaiian people." But that legal theory runs headlong into the Newlands Resolution, which vests absolute and unreviewable title in the United States; the Organic Act of 1900, which confirms the extinguishment of any Native Hawaiian or other claims to the ceded lands; and the Admission Act of 1959, which transfers to the State the same absolute title previously held by the United States. This body of federal law forecloses any competing claims to the ceded lands, such as those respondents present here. It similarly bars any judicial remedy that, like this injunction, is premised on the possible validity of such competing claims.

Brief for Petitioner at 19, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5150171 at *19.

[437] 129 S. Ct. 1436, 1445 (2009).

Hawai'i court's opinion was replete with language that linked its reasoning and judgment to the Apology Resolution, thus making it impossible to deny "that the decision below rested on federal law."[438]

Next, the Court turned to the Apology Resolution's two substantive provisions and examined their effect on Hawai'i's command over public trust land transfers. In the first provision, contained in section one, Congress "acknowledges the historical significance" of the overthrow's centennial, "recognizes and commends" reconciliatory efforts, "apologizes to Native Hawaiians" for their loss of independence, "expresses its commitment to acknowledge the ramifications of the overthrow," and "urges the President of the United States" to do the same.[439] According to the Court, this was a mere declaration of political sentiment;[440] the "conciliatory or precatory" language was not language that "Congress uses to create substantive rights—especially those that are enforceable against the co-sovereign States."[441]

Similarly, the Court found the second substantive provision, contained in section three of the resolution, to be without any force.[442] This provision declares that nothing in the Resolution is "intended to serve as a settlement of any claims against the United States."[443] The Hawai'i Supreme Court characterized the section as a "congressional recognition—and preservation—of claims *against Hawaii*."[444] Under this interpretation, the provision was believed to serve as the basis for reconciliation and the eventual initiation of a settlement process with Native Hawaiians.[445] The U.S. Supreme Court rejected this reasoning, finding "no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another."[446]

In addition to these two provisions, the Apology Resolution opens with thirty-seven "whereas" clauses, and the U.S. Supreme Court took issue with the Hawai'i court's conclusion that these clauses demonstrated Congress' acknowledgement of the continuity of Native Hawaiian claims to the trust lands.[447] The U.S. Supreme Court believed that the clauses could not "bear the weight that the lower court placed on them."[448] They had no "operative effect," and in the absence of such, "a court has no license to make [clauses] do what

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[438] *Id.* at 1443.

[439] Apology Resolution, *supra* note 1, § 1, 107 Stat. at 1513.

[440] *Hawaii*, 129 S. Ct. at 1443-44.

[441] *Id.* at 1443.

[442] *Id.* at 1443-44.

[443] Apology Resolution, *supra* note 1, § 3, 107 Stat. at 1514.

[444] *Hawaii*, 129 S. Ct. at 1444 (emphasis in original).

[445] *See id.*

[446] *Id.*

[447] *See HCDCH I*, 117 Haw. 174, 191, 177 P.3d 884, 901 (2008).

[448] *Hawaii*, 129 S. Ct. at 1444.

[they were] not designed to do."[449] Second, the clauses did not alter any of the State's rights and obligations.[450] Any legislative intent to do so would need to be "clear and manifest," and the Resolution lacked any indication "that Congress intended to amend or repeal . . . rights and obligations" that the State acquired under the Admission Act.[451] Finally, the Court had misgivings about retroactively "clouding" the State's title to land it purportedly acquired in absolute fee in 1959.[452] Doing so "would raise grave constitutional concerns," and the Court was unwilling to extend that much influence to the "whereas" clauses.[453]

The U.S. Supreme Court's decision faulted the Hawai'i Supreme Court for its interpretation of the Apology Resolution,[454] but standing alone, the ruling did not lift the moratorium on trust land transfers. Although the Apology Resolution did not ultimately bring any enforceable means for redress, the Hawai'i Supreme Court also rested its opinion on state law, which arguably could be enough to preserve the injunction. Thus, the U.S. Supreme Court remanded the case, acknowledging that it lacked "authority to decide questions of Hawaiian law."[455]

In May 2009, OHA, three of the individual plaintiffs, and the State reached an agreement to dismiss the lawsuit without prejudice, contingent on the enactment of proposed legislation.[456] Eventually signed into law that year as Act 176,[457] the legislation requires a two-thirds approval by the Legislature for the sale or gift of public trust and other lands.[458] Land exchanges continue to require a two-thirds disapproval of either house or majority disapproval by the entire Legislature.[459] In addition, Act 176 calls for specific details on any sale, gift, or exchange of public trust land to be set forth in a resolution with notice to OHA as well as the Legislature.[460]

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[449] *Id.*

[450] *Id.*

[451] *Id.* at 1445.

[452] *Id.*

[453] *Id.*

[454] *Id.* at 1444-45.

[455] *Id.* at 1445.

[456] Settlement Agreement, *HCDCH I*, 117 Haw. 174, 177 P.3d 884 (2008) (on file with author).

[457] Act 176's legislative history is available at http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=1677 (last visited Mar. 15, 2011).

[458] Act of July 13, 2009, No. 176, § 2, 2009 Haw. Sess. Laws 705, 706-07.

[459] *Id.* § 3.

[460] *Id.* § 2 (codified at HAW. REV. STAT. § 171-64.7) (Supp. 2010)), § 3 (codified at HAW. REV. STAT. § 171-50(c) (Supp. 2010)). In 2011, Act 176 was amended to require State agencies to specify whether a parcel they propose to alienate is part of the public land trust. Act of June 27, 2011, No. 169, § 1, 2011 Haw. Sess. Laws 579, 579-80.

Although Act 176 set up a procedure allowing the State to transfer trust lands, it also created a barrier to adjudication for the only plaintiff who did not settle with the State. In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i* (*HCDCH II*),[461] Jonathan Kay Kamakawiwo'ole Osorio continued to pursue his appeal after remand from the U.S. Supreme Court.[462] Although the Hawai'i Supreme Court could no longer rely on the Apology Resolution, the court in *HCDCH I* had also cited specific state laws as support for the moratorium.[463]

On July 15, 2009, two days after Act 176 became law, the State moved to dismiss Osorio's claims.[464] The State argued that Osorio lacked standing, that the case was not yet ripe for adjudication, and that Osorio sought an advisory opinion.[465] The Hawai'i Supreme Court ruled that Osorio had standing to sue but that Act 176 rendered his claims no longer ripe for adjudication.[466]

Osorio was able to establish his right to sue based on his status as a member of the general public and his rights as a Hawaiian.[467] Section 5(f) of the Admission Act names the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act, as one of the trust purposes.[468] Since the HHCA definition of "Native Hawaiian" is tied to a fifty percent Hawaiian ancestry requirement, the State argued that Osorio, who is Native Hawaiian but not an eligible beneficiary under the HHCA definition, was not a beneficiary of the section 5(f) trust.[469] Therefore, according to the State, Osorio could not bring a claim on behalf of Native Hawaiians or allege an injury in fact for a duty owed to Native Hawaiians.[470]

The court rejected this argument, holding that Osorio could bring a claim as a member of the general public.[471] The court explained that article XII, section

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[461] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH II*), 121 Haw. 324, 219 P.3d 1111 (2009).

[462] *Id.*

[463] *Id.* at 328, 219 P.3d at 1115.

[464] *Id.*

[465] *Id.* at 326, 219 P.3d at 1113.

[466] *Id.* at 339, 219 P.3d at 1126. Having found that that the case was not ripe, the court did not consider the advisory opinion issue. *Id.* at 339 n.13, 219 P.3d at 1126 n.13.

[467] *Id.* at 335, 219 P.3d at 1122.

[468] *Id.* at 329, 219 P.3d at 1116.

[469] *Id.*

[470] *Id.*

[471] *Id.* at 332, 219 P.3d at 1119. The State also seemed to argue that since Osorio stated that he was Hawaiian, rather than Native Hawaiian, and he claimed that his rights as a Hawaiian were "separate and distinct from those of the general public," he could not bring a claim "under article XII, section 7 [sic] as a member of the general public." *Id.* at 333, 219 P.3d at 1120. The court, however, was not convinced, asserting that the State "mischaracterize[d] Osorio's position," *id.*, and that it would be "absurd and contrary to this court's rules of constitutional interpretation" to hold that Hawaiians, who are not specifically delineated as beneficiaries in

4[472] of the Hawai'i Constitution states that both Native Hawaiians[473] *and* the general public are beneficiaries of trust lands.[474] Following an earlier case on standing,[475] the court held that Osorio had established standing as a member of the general public by showing that he suffered an injury in fact and that "a multiplicity of suits may be avoided by allowing [him] to sue to enforce the State's compliance with [section] 5(f) trust provisions."[476] Osorio's injury in fact derived from his status as a member of the general public and trust beneficiary with a "particular and threatened injury" based on his Hawaiian cultural and religious connection to the land.[477] Additionally, Osorio showed that his cultural injuries were traceable to the State's actions in alienating public trust lands; once the lands were "alienated from the public lands trust . . . [they would] be lost forever."[478] Furthermore, the court concluded that an injunction would be favorable to Osorio and provide relief to him as a member of the general public.[479]

Consistent with prior decisions lowering standing barriers in cases of public interest, the court also determined that a multiplicity of suits could be avoided by allowing Osorio to sue to enforce compliance with the section 5(f) trust provisions.[480] Quoting *Pele Defense Fund v. Paty*, the court acknowledged that "unless members of the public [(like Osorio, who happens to be Hawaiian)] and [N]ative Hawaiians, as beneficiaries of the trust, have standing, the State would

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section 7 [sic], cannot sue for breach of trust. *Id.* at 335, 219 P.3d at 1122. Osorio's status as a Hawaiian and having special rights as a Hawaiian did not exclude him from also being considered as a member of the general public "for the purposes of bringing suit under article XII, section 7 [sic]." *Id.* (emphasis omitted).

[472] Although the court referred to article XII, section 7 of the state constitution, it actually quotes from article XII, section 4.

[473] Previous case law had already established that Native Hawaiians as defined in the HHCA have a right to sue to enforce the § 5(f) trust provision. *HCDCH II*, 121 Haw. at 332, 219 P.3d at 1119 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 592 n.8, 837 P.2d 1247, 1257 n.8 (1992) ("The [United States Court of Appeals for the] Ninth Circuit has consistently held that native Hawaiians and native Hawaiian groups have standing to bring claims to enforce the trust provisions of the Admission Act."); Price v. Hawaii, 939 F.2d 702, 706 (9th Cir. 1991) ("[P]ersons in the position of these appellants do have standing to challenge the use of section 5(f) lands."); Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1990) (stating that Native Hawaiians can make allegations sufficient to show that there is an injury in fact even though legitimate section 5(f) uses might not necessarily benefit Native Hawaiians)).

[474] *HCDCH II*, 121 Haw. at 333, 219 P.3d at 1120.

[475] Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982).

[476] *HCDCH II*, 121 Haw. at 335, 219 P.3d at 1122.

[477] *Id.* at 334, 219 P.3d at 1121.

[478] *Id.*

[479] *Id.* at 333, 219 P.3d at 1120.

[480] *Id.* at 335, 219 P.3d at 1122 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 594, 837 P.2d 1247, 1258 (1992)).

be free to dispose of the trust res without the citizens of the State having any recourse."[481]

The court, however, determined that Osorio's claims were not ripe; that is, based on a controversy that is concrete and needs no further factual development.[482] After discussing at length the process established by Act 176,[483] the court concluded that since no land sale had been approved, "it would be appropriate to first allow the legislature to exercise the power reserved to it in Act 176 before this court determines whether such exercise of power is or is not a violation of the State's fiduciary duties."[484]

The Moon Court's public land trust decisions may appear confusing—the court decided the OHA revenue cases against Native Hawaiian interests, but only *after* determining in *OHA I* that OHA was clearly entitled to a share of revenues from airport concessionaires operating on trust lands. As suggested earlier, these decisions may have had more to do with concerns about the state treasury and deference to the legislative branch than Native Hawaiian rights. Moreover, in the revenue cases, the court explicitly pointed to the state constitutional mandate and the responsibility of the Legislature to give meaning to that mandate.[485]

Chief Justice Moon's unanimous *HCDCH I* opinion, a remarkable decision, demonstrated a deep understanding of Hawai'i's history and culture, and the importance of the trust lands to the Native Hawaiian community. Even though the U.S. Supreme Court repudiated the Hawai'i court's reliance on the Apology Resolution, *HCDCH I* was also grounded in Hawai'i trust law and, as indicated in *HCDCH II*, has continuing viability. Moreover, *HCDCH II* recognized that a Native Hawaiian member of the general public who does not meet the HHCA blood quantum limitation nevertheless suffers actual harm through the alienation of trust lands. In the *HCDCH* decisions, the Moon Court, relying on Chief Justice Richardson's *Ahuna* case and Associate Justice Klein's *Pele Defense Fund* decision, walked farther on the path of justice than any other Hawai'i court.

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[481] *Id.* (quoting *Pele Def. Fund*, 73 Haw. at 594, 837 P.2d at 1258).

[482] Citing its decision in *HCDCH I*, the court explained that for ripeness, "the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention." *Id.* at 336, 219 P.3d at 1123.

[483] *Id.* at 337-38, 219 P.3d at 1124-25.

[484] *Id.* at 339, 219 P.3d at 1126. The court thus dismissed the case without prejudice. *Id.*

[485] Office of Hawaiian Affairs v. State (*OHA I*), 96 Haw. 388, 400, 31 P.3d 901, 913 (2001); Office of Hawaiian Affairs v. State (*OHA II*), 110 Haw. 338, 366, 133 P.3d 767, 795 (2006). Indeed, the Legislature's 2012 action to settle the issue of back revenues due OHA indicates that the Legislature took the Moon Court's admonition to heart. *See* Act of April 11, 2012, No. 15, 2012 Haw. Sess. Laws 24.

## VI. CONCLUSION

Chief Justice Moon's seventeen-year tenure on the Hawai'i Supreme Court has had a lasting impact on Native Hawaiians. The Moon Court opened the doors of the judiciary to the Native Hawaiian people and gave recognition to the historical claims of the Native Hawaiian community to lands, natural and cultural resources, and ultimately, sovereignty. The major decisions authored by Chief Justice Moon in the last five years of his tenure—*Kalima*, *HCDCH I*, *HCDCH II*, and *Kaleikini*—show a strong and growing recognition of the role the courts play in bringing about reconciliation and healing in society. The Moon Court walked the path of justice, Ke Ala Pono, and set a solid course toward reconciliation.

Controversies over trust lands, natural and cultural resources, and sovereignty will continue to challenge the people of Hawai'i in the coming years, and Hawai'i's courts will be called upon to address those controversies. To reconcile Hawai'i's past with its future, to bring about balance, harmony and aloha, and to hold us together as a community, the Hawai'i Supreme Court must continue to travel the path of justice.